Supreme Court, U. S.
FILED
JUN 21
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1815

WILLIE MAE PAYNE, *et al.*, *Petitioners*,

v.

TRAVENOL LABORATORIES, INC., *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Dated: June 21, 1978

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IN THE

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October Term, 1977

No.

Willie Mae Payne, *et al.*, *Petitioners*,

v.

Travenol Laboratories, Inc., *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Willie Mae Payne, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this case on January 6, 1978 and modified on March 23, 1978.

OPINIONS BELOW

The opinion of the court of appeals is reported at 565 F.2d 895, and is reproduced in the Appendix at pp. 1a-8a.

The opinion of the district court is reported at 416 F.Supp. 248, and is reproduced in the Appendix at pp. 32a-65a. Its original decision on class membership

is unreported, but is reproduced in the Appendix at pp. 27a-28a. Its subsequent narrowing of the class is also unreported, but is reproduced in the Appendix at pp. 29a-31a.

Also reproduced in the Appendix are the following record findings and determinations of the United States Equal Employment Opportunity Commission on the charges of discrimination filed by petitioners against the respondents: the District Director's Findings of Fact—Revised on a charge filed by petitioner Willie Mae Payne (App. 9a-14a), the Field Director's Findings of Fact on charges filed by petitioner Delilah Cherry (App. 15a-21a), and the District Director's Determination of the charges filed by petitioner Cherry. (App. 22a-26a).

JURISDICTION

The decision of the court of appeals was entered on January 6, 1978. The court of appeals denied petitioners' petition for rehearing and suggestion for rehearing *en banc* on March 23, 1978. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The petitioners were black job applicants rejected because they did not meet the respondents' tenth-grade education requirement for hire. They filed timely EEOC charges and timely suit, and they prevailed on the merits of their claims both before the EEOC and before the district court. They were held by the court of appeals to lack standing to challenge the tenth-grade requirement merely because, at some time subsequent to their original rejections for employment,

they took and passed a G.E.D. equivalency test. This raises the following questions:

1. Whether the court of appeals applied an unduly restrictive standing requirement in conflict with the decisions of this Court, with the decisions of other courts of appeals, and with the remedial purposes of fair employment legislation, by denying standing and therefore penalizing petitioners, on the ground that after their original rejections for employment they eventually passed a G.E.D. equivalency test and thus finally made themselves employable.

2. Whether the court of appeals improperly restricted standing in fair employment cases, in conflict with the decisions of this Court, with the decisions of other courts of appeals, and with the remedial purposes of fair employment legislation, by refusing to consider, for the purposes of determining standing, any personal injury suffered by the petitioners and timely raised in their EEOC charges and in their judicial Complaint, before an arbitrary date selected by the district court for the wholly unrelated purpose of imposing a time limitation on class membership, and thus denied petitioners the complete relief to which they are entitled under the decision of this Court in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975).

3. Whether the effect of the decision below, by forcing the intended beneficiaries of fair employment legislation to remain unemployable as a condition of preserving their claims to relief, improperly bars access to the courts.

STATUTES INVOLVED

42 U.S. § 1981 provides in pertinent part as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . .

The pertinent provisions of § 706 of Title VII of the Civil Rights Act of 1964, 78 Stat. 259-61, which were in effect at the time this suit was filed and which govern this proceeding are:

> (a) Whenever it is charged in writing under oath by a person claiming to be aggrieved . . . that an employer . . . has engaged in an unlawful employment practice, the Commission shall furnish such employer (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. . . .
>
> * * *
>
> (d) A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred. . . .
>
> (e) If within thirty days after a charge is filed with the Commission . . . the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved. . . . Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. . . .
>
> (f) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. . . .
>
> (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). . . .

STATEMENT

Petitioners Willie Mae Payne and Delilah Cherry are black women who, at the time this case was filed, were unsuccessful applicants for employment with the respondents Travenol Laboratories, Inc., and Baxter Laboratories, Inc., at their plant in Cleveland, Mississippi,[1] and who had earlier been rejected for failure to meet the respondents' educational requirement.

The respondents' primary entry-level jobs at the Cleveland plant are the Assembler and Material Handler jobs. From the opening of the plant in 1950 until February 1965, only white applicants were hired into

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[1] Petitioner Delilah Cherry was subsequently hired.

these jobs and there was no educational requirement applicable to these jobs. In February 1965, shortly after the respondents had removed their formal racial bar on the hiring of blacks for these jobs, the respondents adopted a requirement that applicants for these jobs possess a tenth-grade education or G.E.D. equivalency as a condition of eligibility for employment.[2] That requirement continued in force until it was enjoined by the district court on February 19, 1976. (App. 39a-40a, 45a-46a, 69a).

Petitioner Willie Mae Payne completed the seventh grade in school, and did not receive a tenth-grade G.E.D. equivalency certificate until January 19, 1970. (App. 34a). She testified in her trial deposition that she had first tried to obtain employment with the respondents in 1967 or 1968 by following the required procedure of applying at the Mississippi State Employment Service,[3] that she was not referred to the respondents because of her lack of a tenth-grade edu-

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[2] In 1965, the respondents had educational requirements for Assembler and Material Handler jobs only at the two plants—Cleveland and Kingstree, South Carolina—which were located in counties with a population over 60% black. At the respondents' other four plants with Assembler and Material Handler jobs, the black proportion of the local population was 5.2% or less. The 1970 Census figures are not of record, but can be judicially noticed by this Court.

[3] The Mississippi State Employment Service was the exclusive source of applicants for Assembler and Material Handler positions, and acted as the agent of the respondents in enforcing the tenth-grade education requirement. (App. 40a). Contrary to the implication of the court of appeals (App. 3a), the stipulation of the parties and the unchallenged findings of the district court establish that rejections by the Employment Service for failure to meet the tenth-grade requirement were the equivalent of rejections by the respondents.

cation, that she returned frequently to the Employment Service office between her first visit and her ultimate receipt of a tenth-grade G.E.D. equivalency certificate in 1970, seeking referral to the respondents and being refused. The respondents introduced no evidence to dispute her testimony, and the district court found that the Employment Service had refused to refer her (App. 34a note 2). After she obtained her tenth-grade equivalency certificate in 1970, the Employment Service referred her to the respondents and she applied there but was not hired. (App. 34a). She filed a lay EEOC charge on January 29, 1970, alleging that, even though she had now complied with the tenth-grade requirement, she still could not get hired. She filed a second charge on March 3, 1970. The EEOC investigated the tenth-grade requirement, and concluded that it was improper. (App. 12a, ¶ 37). After exhaustion of the Title VII administrative process, this suit was filed on March 2, 1972, challenging the tenth-grade requirement and a number of other employment practices under Title VII and 42 U.S.C. § 1981. The suit was filed as a class action on behalf of all black applicants and employees. Jurisdiction was based upon § 706(f) of the Civil Rights Act of 1964, 78 Stat. 260-61, and upon 28 U.S.C. § 1343(4).

Petitioner Delilah Cherry completed the eighth grade in school, and did not receive a tenth-grade G.E.D. equivalency certificate until 1967. She first tried to obtain employment with the respondents in 1965 or 1966 by asking the Employment Service to refer her to them, but was rejected because of her lack of a tenth-grade education. Following her receipt of a tenth-grade G.E.D. equivalency certificate in 1967, the Employment Service did refer her to the respond-

ents and she unsuccessfully applied there for employment several times, but was not hired until 1974. (App. 34). The respondents introduced no evidence to dispute her testimony, and the district court found that the Employment Service had originally refused to refer her (App. 34a note 2). She filed EEOC charges of discrimination on August 15, 1970 and January 12, 1971. The EEOC found in its investigation of her charge that the respondents' tenth-grade requirement had a disproportionately adverse effect on blacks, (App. 21a, ¶ 38), and determined that there was reasonable cause to believe that the tenth-grade requirement violated Title VII. (App. 24a-25a). On June 18, 1973, after exhausting the Title VII administrative process, petitioner Cherry timely moved to intervene in this case. The intervention was allowed.

On November 16, 1972, the district court certified a class consisting of all past, present and future black applicants and employees except for those who applied or were employed prior to March 3, 1970. (App. 27a). On December 20, 1974, the class was redefined and narrowed so as to limit the class to black women and exclude from the class all black women who lack a tenth-grade education or equivalency.[4] The time limi-

[4] The district court limited the class after the respondents had assured the district court that the limitations on the class would not affect petitioners' ability to challenge respondents' practices:

> But, again, the question before this Court now is not what practices plaintiffs can attack but rather what persons they can represent in making their attack. . . .

Defendants' Memorandum of Points and Authorities in Support of their Motion to Redefine Class at 9. Further, the defendants assured the district court:

> The questions before the Court on the matter of class definition will have no effect on plaintiffs' capacity to obtain sweeping injunctive relief if they are successful. All the practices they challenge will be foreclosed to defendants for the future. The across-the-board approach takes care of that. There will be no anomalies.

Defendants' Reply to Opposition to Motion to Redefine, at 1.

tation on class membership was retained. (App. 29a-30a). The district court subsequently finalized its class definition and certified it for interlocutory review under 28 U.S.C. § 1292(b). 74 F.R.D. 14. A petition seeking review of the class limitations was filed in the Fifth Circuit, but the petition was denied.

The case was tried to the district court without a jury, and on February 19, 1976, the district court found that the tenth-grade requirement was unlawful, that it had a disproportionately adverse effect on blacks, that it had not been validated, and that it was not significantly related to job performance. (App. 42a-46a). The court was particularly critical of the facts "that the standard was not adopted until the defendants began desegregating their work force", and that "the Cleveland plant had [previously] operated successfully for more than fifteen years without an educational policy of any sort in regard to the employment process". (App. 45a). The district court also found that the respondents had engaged in subjective hiring discrimination against black applicants (App. 47a), and in a number of other discriminatory practices. The court enjoined the tenth-grade requirement and some other practices. (App. 69a).

The respondents appealed under 28 U.S.C. § 1292 (a)(1) from the entry of injunctive relief against them, and on January 6, 1978, the court of appeals affirmed part of the injunction, but reversed the in-

junction against the tenth-grade requirement on the ground that petitioners lacked standing to challenge the requirement.[5] (App. 3a-5a).

The court of appeals held that the time critical to the determination of standing was the time at which the complaint was filed, and expressly rejected the argument that such a holding would penalize the victims of statutorily forbidden discrimination by forcing them to remain unqualified in order to preserve their access to court. The distinction, according to the court of appeals, was between employer-initiated actions to moot a case—such as an offer and acceptance of a promotion—which do not affect standing because otherwise "the individual-initiated enforcement structure of Title VII would be seriously jeopardized", and victim-initiated actions to become employable, as to which the loss of standing would presumably have no such effect. (App. 3a-4a).

The court of appeals also held that it was irrelevant whether petitioner Payne had suffered personal injury from the tenth-grade requirement within the ninety-day charge-filing period under Title VII, because this period was before the March 3, 1970 date used to fix class membership "so that the situation prior thereto is irrelevant on this appeal." (App. 5a).

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[5] The court of appeals also noted that, because of the exclusion from the class of persons with less than a tenth-grade education, "no member of the class could claim to be aggrieved," (App. 8a). The court of appeals has never reviewed, and did not have jurisdiction over, the exclusions from the class. Because the court of appeals had earlier denied interlocutory review of the restrictions on the class, this restriction can now only be reviewed upon entry of a final judgment.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals should be reviewed by this Court for three reasons. *First,* the court of appeals has invented a restrictive standing test that penalizes the intended beneficiaries of fair employment legislation for overcoming discriminatory barriers and trying to make themselves employable. It is contrary to the purposes of such legislation to require these beneficiaries to sacrifice the possibility of employment in order to assert their rights to equal employment opportunity. The decision on standing below is also in conflict with the decisions of this Court and of courts of appeals other than the Fifth Circuit.

Second, the court of appeals' use of the district court's arbitrary class membership date[6] to eradicate petitioners' claims for complete relief has severely penalized petitioners for bringing their case as a class action. If they had brought this case as an individual action, events prior to March 3, 1970 would have been relevant in the eyes of the court of appeals, and there would have been no problem with petitioners' standing. The court of appeals' use of the class membership date has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

Third, the decision below has created unwarranted restrictions on the access to the courts of the intended

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[6] The only relationship between the class membership date of March 3, 1970 and any date relevant to this lawsuit is that March 3, 1970 was the date on which petitioner Payne filed the second of the two EEOC charges on which she brought suit. Petitioners sought interlocutory review of this limitation on class membership as well as others, but the Fifth Circuit denied the petition for review.

beneficiaries of fair employment legislation, contrary to the remedial purposes of such legislation. The failure to resolve now the questions raised by the decision of the court of appeals will leave the victims of prohibited discrimination uncertain whether they must pay the heavy price of continued unemployability, in terms of an unlawful requirement, in order to preserve their claims for relief arising from the harm already done to them by that requirement.

A. The Approach to Standing in the Decision Below Is in Conflict With the Decisions of This Court and With the Decisions of Other Courts of Appeals

The standing issue herein comes to this Court in a relatively unusual posture. Unlike the situation in many of this Court's standing cases, the EEOC, charged by Congress with the administration of Title VII, here determined both that the charges filed by petitioners were appropriate vehicles to resolve the legality of the respondents' tenth-grade requirement, and that there was reasonable cause to believe that the requirement was unlawful (App. 14a; ¶ 37; 21a, ¶ 38; 24a-25a), and the district court determined after a full trial that the requirement was in violation of Title VII. This case therefore does not come to this Court as an abstract pleading matter, but after the merits of the tenth-grade requirement have engaged administrative and judicial resources for eight full years.

Nor does this case come to this Court burdened by any question whether Congress desired the rights in question to be enforced by private litigation; Congress has taken every conceivable step to encourage the filing of lawsuits asserting precisely the type of rights asserted herein. *Infra* at 22-23.

The ensuing discussion of the standing question is in two parts; the first does not depend on the petitioners' having been personally harmed by the tenth-grade requirement, and the second is based on personal injury to them.

1. The decisions of this Court and of the courts of appeals establish that petitioners have standing to challenge practices limiting the number of blacks in the respondents' plant

There is no dispute that, at all times relevant to the determination of standing, the petitioners have been interested in obtaining employment with the respondents. Particularly with an employer which has engaged in subjective racial discrimination in hiring (App. 47a-48a) and in promotions (App. 53a-54a), black applicants who have been harmed by some acts of discrimination have a direct, personal interest in ending every other discriminatory practice which reduces the number of black employees or which perpetuates a discriminatory working environment, whether or not that practice has affected them personally.

In *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 225, 211-12 (1972), this Court held that a white tenant and a black tenant of an apartment complex, who were not themselves the objects of their landlord's racial discrimination in housing, were sufficiently injured by loss of the potential benefits of living in a nondiscriminatory community to have standing to sue under § 810(a) of the Civil Rights Act of 1968, 42 U.S.C. § 3610(a). Because Congress had intended standing to be defined as broadly as permitted

by Article III, 409 U.S. at 209, the prudential doctrine of standing [7] had no application.

Every court of appeals to consider the question, until entry of the decision below, has held that standing under Title VII is defined as broadly as is permitted under Article III. *Hackett* v. *McGuire Bros.*, 445 F.2d 442, 446 (3rd Cir., 1971), so held and was approved by this Court in *Trafficante*, 409 U.S. at 209. *Gray* v. *Greyhound Lines, East*, 545 F.2d 169, 176 (D.C. Cir., 1976), held that black employees had Article III standing to challenge hiring practices which had not affected them, because they were harmed by an atmosphere of discrimination. *Waters* v. *Heublein*, 547 F.2d 466 (9th Cir., 1976), *cert. den.*, 433 U.S. 915 (1977), held that a white woman had standing to sue to enjoin discrimination against blacks and Hispanics because of her interest in working in a nondiscriminatory atmosphere.[8] *EEOC* v. *Bailey Co.*, 563 F.2d 439, 452-54 (6th Cir., 1977), *cert. den.*, 55 L.Ed.2d 506 (1978), held that a white person has standing under Title VII to file an EEOC charge challenging racial discrimination against blacks.[9]

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[7] *Barrows* v. *Jackson*, 346 U.S. 249, 255 (1953); *Ass'n of Data Processing Service Org'ns* v. *Camp*, 397 U.S. 150, 154 (1970).

[8] Both *Gray* and *Waters* held that the question whether such plaintiffs can represent a class of those harmed by such requirements was distinct from the question whether such plaintiffs could sue to enjoin the practices. The class restrictions herein are not before this Court, and the only question to be resolved is that of standing to seek injunctive relief as in *Gray* and *Waters*.

[9] To the extent that it is important under the *Trafficante* rule to establish that private litigation is the primary means of enforcing Title VII, government statistics make this point most firmly. In fiscal year 1976, 5,321 Title VII actions were filed. ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE U.S. COURTS 204 (1977). The latest information available from the EEOC, that for fiscal year 1975, shows that the agency filed only 180 Title VII cases and intervened in only 36 others. EEOC, 10TH ANNUAL REPORT at 10 (1976).

The decision below is thus in conflict with the approach taken by this Court in *Trafficante*, and directly in conflict with the decisions of the District of Columbia, Sixth and Ninth Circuits.

2. The Court of Appeals' refusal to consider whether petitioners had timely claims of past, direct personal injury from the tenth-grade requirement, and its insistence on having substantial ongoing personal claims as a condition of standing, is in conflict with the decisions of this Court and other courts of appeals

Petitioners have clearly been harmed within the period of limitations by the respondents' tenth-grade requirement. The present law on the period of limitations in Mississippi is that claims for injunctive relief under 42 U.S.C. § 1981 are governed by the six-year period of limitations in *Miss. Code Ann.* (1972) § 15-1-49, and that claims for back pay are governed by the three-year period in *Miss. Code Ann.* (1972) § 15-1-29. *Walton* v. *Utility Products*, 424 F.Supp. 1145, 1147 (N.D.Miss., 1976). Accepting this decision for present purposes,[10] there is no reason why a different limitations period should apply to Title VII cases filed before the effective date of the 1972 amendments.[11]

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[10] This question is now before the district court on remand, and is not at issue here.

[11] In amending Title VII in 1972, Congress left no doubt that back pay should be recoverable for a substantial period before the filing of the EEOC charge; § 706(g) was amended to state that back pay should not accrue from a date more than two years prior to the filing of the charge. 86 Stat. 197. Back pay in Title VII

Under Title VII, therefore, petitioner Payne's January 29, 1970 EEOC charge tolled the six-year period for purposes of injunctive relief and the three-year period for purposes of monetary relief.[12] Petitioners Payne's and Cherry's earliest efforts to obtain employment are within the period of limitations for injunctive relief. Petitioner Payne's efforts are well within the monetary period of limitations and, depending on the precise date in 1967 on which petitioner Cherry took the G.E.D. equivalency test,[13] she may also be within the monetary period of limitations under Title VII.

Under 42 U.S.C. § 1981, the period of limitations for injunctive relief would extend back to March 2, 1966, and the period for monetary relief would ex-

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cases filed prior to the effective date of the 1972 amendments is governed by the appropriate State period of limitations, tolled by the filing of the charge. *United States* v. *Georgia Power Co.*, 474 F.2d 906, 922-25 (5th Cir. 1973); *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301, 315 (6th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977); *EEOC* v. *Steamfitters, Local 638*, 542 F.2d 579, 590 (2nd Cir., 1976), *cert. den.*, 430 U.S. 911 (1977).

[12] As a class member intervening in a class action, petitioner Cherry has the benefit of petitioner Payne's filing dates.

[13] The present record does not state all dates precisely, because the governing law at the time of trial was that the filing of an EEOC charge tolled the period of limitations for claims under 42 U.S.C. § 1981. *Boudreaux* v. *Baton Rouge Marine Contracting Co.*, 437 F.2d 1011, 1017, note 16 (5th Cir., 1971); *Franks* v. *Bowman Transportation Co.*, 495 F.2d 398, 405 (5th Cir., 1974), *reversed on another question*, 424 U.S. 747 (1976); *Guerra* v. *Manchester Terminal Corp.*, 498 F.2d 641, 648-49 (5th Cir., 1974). This Court's rejection of this rule in *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975), was not decided until May 19, 1975, two months after the March 14, 1975 end of the trial herein. Petitioners herein have thus never had a chance to present evidence of events on specific dates in light of this change in the law.

tend back to March 2, 1969. The injunctive period of limitations would include petitioner Payne's, and possibly petitioner Cherry's, applications for referral to the respondents and her rejections. The injunctive period would include the "period of futility" for both of them—that period after their original rejections for failure to meet the educational requirement and before they achieved their G.E.D. equivalency certificates, when they were still interested in employment—as demonstrated by their subsequent applications—but when further applications would meet with certain rejection.

For petitioner Payne, the "period of futility" lasted until her receipt of a tenth-grade G.E.D. equivalency on January 19, 1970, and thus into both the three-year monetary period of limitations on her § 1981 claim and the ninety-day EEOC charge-filing period for both of her charges. Both petitioners were clearly "persons aggrieved" under both Title VII and 42 U.S.C. § 1981 during this period. *Cf. Int'l Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 365-68 (1977).

This Court, of course, does not sit to re-examine factual determinations by the courts of appeals. No such question is presented by either this petition or the decision below. Rather, it is the *refusal* of the court of appeals to consider even the possible existence of petitioners' timely claims for relief, arising from direct personal injury from the tenth-grade requirement, that merits this Court's review.

The matters stated above were brought to the attention of the court of appeals, and its decision makes very clear its view that the existence of such personal

claims is irrelevant to the determination of standing unless the injury continued past a certain point in time:

> In this case, however, the trial court's definition of the class removed from consideration all applications for employment submitted to Travenol prior to March 3, 1970, so that the situation prior thereto is irrelevant on this appeal.

(App. 5a). The same refusal to consider the petitioners' timely claims of direct personal injury is evident in the decision's discussion of the situation at the time the complaint was filed. The court of appeals did not even address the question whether petitioners had timely *claims* at that point, nor even the question whether the discriminatory *practice* which had caused past injury was ongoing, but confined itself to noting that the *personal claims were not ongoing* at that point:

> At the time crucial to the issue of standing, when the complaint was filed, all three of the named plaintiffs satisfied the tenth-grade education requirement.

(App. 3a).[14]

This parsimonious approach to standing under Title VII and under § 1981 is in essence a holding that direct personal injury is not enough to confer standing;

[14] In response to petitioners' Petition for Rehearing and Suggestion for Rehearing *En Banc* before the Fifth Circuit, the respondents conceded that the decision of the court of appeals could not stand if petitioners had timely personal claims. The respondents, of course, disputed the existence of those claims. Even in the face of this concession, however, the court of appeals refused to address petitioners' efforts to obtain employment with the respondents prior to the class membership date.

the injury must be of a certain dimension before the courts should take cognizance of it for purposes of standing. This approach is in conflict with the decision of this Court in *United States* v. *S.C.R.A.P.*, 412 U.S. 669, 689 note 14 (1973), refusing to limit even prudential standing to persons "significantly" affected by the practices under challenge. The approach is also in conflict with the decisions in *Trafficante, Gray, Waters,* and *Bailey Co.,* that standing under some civil rights laws is as broad as is permitted by Article III.

The decision of the court of appeals is also inconsistent with the "make-whole" and "deterrence-to-discrimination" purposes of Title VII. *Albemarle Paper, supra.* "Complete relief" on a claim of discrimination has obviously not been afforded until the discrimination giving rise to the harm has been ended. The ordinary rule is that, where discrimination has been found, Federal courts must be alert to adjust their remedies so as to give the fullest possible relief, *Bell* v. *Hood,* 327 U.S. 678, 684 (1946), and that courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States,* 380 U.S. 145, 154 (1965).

It is particularly ironic that the court of appeals never disturbed the finding of discrimination by the district court, but rather than exercise its duty of alertness to grant full relief chose to ignore the claim for relief by ignoring petitioners' personal injury.

B. The Use of an Arbitrary Class Membership Date to Eradicate Petitioners' Claims for Complete Relief Merits Review by This Court

No proposition is more central to the law of jurisdiction in civil rights cases than that it is mandatory. Where Congress has provided a remedy in the Federal courts for deprivations of civil rights, neither the district court nor a court of appeals has discretion to refuse to hear the claim.

This Court has held that there are only two prerequisites to suit under Title VII: the timely filing of an EEOC charge and the timely filing of suit after receipt of a notice of right to sue. *Love* v. *Pullman Co.*, 404 U.S. 522, 526-27 (1972); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798-99 (1973); *Alexander* v. *Gardner-Denver Co.*, 411 U.S. 36, 47 (1974). The court of appeals has in effect held that there is a third, and unpredictable, requirement: that the personal claim of the named plaintiff has continued past an arbitrary date which is not to be announced until substantially after the filing of the Complaint.[15]

Matters of jurisdiction and of standing—to say nothing of the survival of personal claims—must be predictable if the nation is to have an orderly system of judicial enforcement of fair employment laws.[16]

[15] In this case, the March 3, 1970 class limitation was not announced until more than eight months after the filing of the Complaint, and its use to eradicate the petitioners' standing was not announced until the entry of the decision of the court of appeals almost six years after the filing of the Complaint.

[16] The litigation of fair employment cases is both time-consuming and expensive. It is not uncommon for plaintiffs' counsel to spend in excess of one or two thousand hours in discovery, preliminary motions and pretrial preparation, and to expend tens of thousands of dollars in out-of-pocket expenses. In the case at bar, for example, out-of-pocket expenses totalled more than $36,000. *Payne* v. *Travenol Laboratories*, 74 F.R.D. 19, 22 (N.D.Miss., 1976). In *Sledge* v. *J. P. Stevens & Co.*, 12 E.P.D. ¶ 11,047 at p. 4885 (E.D. N.C., 1976), out-of-pocket expenses totalled more than $31,000. These are large sums to plaintiffs in fair employment cases and to the civil rights organizations trying to assist them, and a rule creating unpredictable, random dangers to standing may so increase the risks of fair employment litigation as to jeopardize the clear Congressional goal of encouraging such litigation.

There is no place in such an orderly system for the built-in eccentricity in a court's jurisdiction which must inevitably follow from the use of arbitrary dates, set for wholly unrelated purposes, to determine questions of standing.

The decision of the court of appeals has also penalized petitioners for having brought their case as a class action. Only because they sought to benefit others as well as themselves have they been subjected to the denial of complete relief. Petitioners know of no other decision holding that the personal claims for relief of a named plaintiff may be endangered solely because her case was brought as a class action. Nor is this rule consistent with the intent of Congress to encourage private fair employment litigation to effectuate these statutes; class actions are essential to accomplish this goal,[17] and the decision below can only deter the bringing of class actions.

[17] The legislative history of the Equal Employment Opportunity Act of 1972 demonstrates the importance Congress attached to the availability of class actions to enforce the statute. Section-by-Section Analysis, 118 Cong. Rec. 7168, *Legislative History of the Equal Employment Opportunity Act of 1972* (Senate Committee Print, 92d Cong., 2d Sess.) at 1847 (remarks of Senator Williams); 118 Cong. Rec. 7565 (remarks of Rep. Perkins).

The decision of the court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

C. The Decision Below Improperly Restricts Access to the Courts, and Is Inconsistent With the Remedial Purposes of Fair Employment Legislation

In enacting Title VII of the Civil Rights Act of 1964, Congress was clearly concerned that financial considerations might deter the intended beneficiaries of the legislation from filing suit, and took every possible action to encourage the filing of enforcement suits. To improve the access to the courts of persons without lawyers of their own, it provided that district courts may appoint counsel in appropriate cases. § 706(e), 78 Stat. 260. To improve the access to the courts of persons of limited means, it provided that district courts may authorize the commencement of such actions without the payment of fees, costs or security. *Id.*[18] To encourage the filing of actions for injunctive relief, Congress provided that district courts may award fees and costs to the prevailing party, § 706(k), 78 Stat. 261. To encourage the filing of such actions under 42 U.S.C. § 1981, Congress amended 42 U.S.C. § 1988 to provide for such awards. Civil Rights Attorney's Fees Awards Act of 1976. 90 Stat. 2641. *And see Newman* v. *Piggie Park Enterprises,* 390 U.S. 400 (1968); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 415 (1975); *Christiansburg Garment Co.* v. *EEOC,* 54 L.Ed.2d 648, 657 (1978).

[18] These provisions were re-enacted in the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 106, creating a new § 706(f)(1).

Congress could not have made plainer its intention that access to the courts to enforce Title VII and § 1981 be broad and unhampered.

This Court has also interpreted the access-to-the-court provisions of Title VII in conformity with this clear congressional purpose. In *Love* v. *Pullman Co.,* 404 U.S. 522, 526-27 (1972), this Court held that the creation of additional procedural technicalities hampering access to the courts was inconsistent with the purposes of Title VII and was "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." In *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 798-99 (1973), this Court decided that a complainant's right to bring suit under Title VII is not restricted to those charges as to which the EEOC had made findings of reasonable cause. In the course of its decision, this Court said:

> . . . [W]e will not engraft on the statute a requirement which may inhibit the review of claims of employment discrimination in the federal courts.

The decision of the court of appeals that a Title VII complainant must remain unemployable, because of a discriminatory requirement, until his or her suit is filed in court, on pain of loss of standing to challenge a requirement that, although subsequently complied with, has caused the complainant actual harm, is clearly in violation of the congressional intent that financial considerations not impede the access to court of the persons Title VII was intended to benefit, and flies in the face of this Court's refusal to countenance artificial restrictions on the access of Title VII com-

plainants to the courts. It is also in conflict with the decision of the Third Circuit that a plaintiff's application for pension benefits and acceptance of them before the date he filed suit for reinstatement and back pay—so that he was not then "being aggrieved" —did not deprive him of access to the courts. *Hackett, supra,* 445 F.2d at 446-47.

D. The Failure to Resolve These Questions Now Will Effectively Force Civil Rights Complainants to Forego the Possibility of Employment, in Order to Preserve Their Standing to Challenge a Discriminatory Requirement That Has Harmed Them

This Court should not defer to a later day and case its examination of the changes in the law of standing in fair employment litigation announced by the decision below. Throughout the States in the Fifth Circuit, the intended beneficiaries of fair employment legislation are faced with a harsh choice that Congress never intended to impose upon them: either to forego efforts to meet discriminatory qualifications and make themselves employable, or to forego the rights to redress for past injury granted them by Congress.

This Court has previously drawn attention to the practical inadequacy of back pay awards to compensate for the hardship of " 'many years of undeservedly substandard earnings' ", *NLRB* v. *J. H. Rutter-Rex Mfg. Co.,* 396 U.S. 258, 264 (1969), *quoting NLRB* v. *Mastro Plastics Corp.,* 354 F.2d 170, 180 (2nd Cir., 1965), and this remedy becomes far more unsatisfactory and inadequate if it is available only at the sacrifice of possible present earnings. Victims of statutorily prohibited practices should not be required to make and to continue such sacrifices any longer than is necessary. Nor, in the case of civil rights complainants who cannot afford to make this sacrifice, should they or their counsel be led to believe, any longer than is necessary, that their rights have been lost because of the economic necessity of seeking employment, and that the filing of suit would be futile. Rights to which Congress has assigned a high priority may be lost finally if the filing of such cases is long delayed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 21, 1978

APPENDIX

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

Willie Mae PAYNE et al., *Plaintiffs-Appellees,*

v.

TRAVENOL LABORATORIES, INC.
and Baxter Laboratories, Inc., *Defendants-Appellants.*

No. 76-1801.

(Jan. 6, 1978.)

Appeal from the United States District Court for the Northern District of Mississippi.

Before THORNBERRY, AINSWORTH and RONEY, *Circuit Judges.*

RONEY, *Circuit Judge:*

This Title VII class action appeal involves four disputed paragraphs of an injunction. The first paragraph, being a general injunction against employment discrimination on the basis of "color, race or sex," violates Fed.R.Civ.P. 65(d), which requires specificity and detail in injunctive orders. It must be set aside. The next three paragraphs involve educational employment requirements of tenth grade, twelfth grade, and college degree for various jobs, which requirements are alleged to discriminate against prospective black employees. Because plaintiffs lack standing to contest the tenth grade requirement, the injunctive relief ordered in respect to that education requirement is set aside. The relief ordered as to the twelfth grade and college degree requirements is supported by the record, and is affirmed. Both parties agree that a fifth paragraph relating to coverage for pregnancy and related disabilities must be vacated in light of *General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976). Because the dis-

trict court's opinion has been published, it is unnecessary to relate again all of the details of this lawsuit. *Payne v. Travenol Laboratories, Inc.*, 416 F.Supp. 248 (N.D.Miss.1976).

General "Obey the Law" Injunction

Plaintiffs contend that a general injunction in this case should be permitted because the defendants' discrimination at the Cleveland, Mississippi, pharmaceutical manufacturing plant has been long, varied, and imaginative. Specific relief can be structured for the named plaintiffs, however, and the general relief in favor of a class of "all present, past and future black female employees and applicants at the Cleveland plant" carries the order beyond that permitted by the rules.

The paragraph enjoined defendants from discriminating on the basis of color, race, or sex in employment practices, prohibiting defendants from:

> (1) Discriminating on the basis of color, race, or sex in employment practices or conditions of employment in defendants' Cleveland, Mississippi facility, against the named plaintiffs in the above captioned action or either of them, or any member of the class which they represent, as such class is defined in the court's memorandum of opinion this day released in said action.

This paragraph clearly fails to satisfy the requirements that an injunction "be specific in terms" and "describe in reasonable detail . . . the act or acts sought to be restrained . . . ." Fed.R.Civ.P. 65(d). This command of specificity is a reflection of the seriousness of the consequences which may flow from a violation of an injunctive order. *See Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 438-39, 96 S.Ct. 2697, 2706, 49 L.Ed.2d 599 (1976). The word "discriminating," like the word "monopolizing" in *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 125-26, 68 S.Ct. 947, 92 L.Ed. 1245 (1948), is too general. The provi-

sion is more specific than Title VII itself only in that it does not prohibit employment discrimination based on religion and natural [sic] origin. *See* 42 U.S.C.A. § 2000e-2. Such "obey the law" injunctions cannot be sustained. *See, e. g., NLRB v. Express Publishing Co.*, 312 U.S. 426, 435-36, 61 S.Ct. 693, 85 L.Ed. 930 (1941); *Russell C. House Transfer & Storage Co. v. United States*, 189 F.2d 349, 351 (5th Cir. 1951).

Tenth Grade Requirement: Standing

The second paragraph prohibited defendants from:

> (2) Requiring a tenth grade education (or its equivalency on a General Education Development [GED] test) of applicants for employment for operative positions in defendants' said facility.

Defendants attack this part of the injunction on the ground that the three named plaintiffs lack standing to question the legality of the tenth grade requirement. At the time crucial to the issue of standing, when the complaint was filed, all three of the named plaintiffs satisfied the tenth grade education requirement. Indeed, the trial court found that each of the named plaintiffs had fulfilled the requirement prior to submitting applications at the Cleveland plant. *Payne v. Travenol Laboratories, Inc., supra,* 416 F.Supp. at 251, 252. Thus plaintiffs can hardly argue that their rejections resulted from the imposition of a discriminatory educational standard.

To meet the requirement for standing under Article III, a plaintiff must establish either that the asserted injury was in fact the consequence of the defendant's action or that prospective relief will remove the harm. *Warth v. Seldin,* 422 U.S. 490, 505, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). As this Court recently noted in *Thurston v. Dekle,* 531 F.2d 1264 (5th Cir. 1976):

> The fact that some members of the class may have had standing to raise this claim is irrelevant. . . .

> [T]he necessary requirement is for a *named* plaintiff to have standing at the time the litigation is filed. We are unaware of any case where any federal court has reached a substantive issue absent a named plaintiff who had standing at the time the action was filed.

Id. at 1269-70 (emphasis in original). Here, neither the named plaintiffs nor the class, which was defined to exclude black females lacking tenth grade educations, had standing to attack the tenth grade requirement.

Citing *Jenkins v. United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968), plaintiffs argue that a named plaintiff should not be forced to remain unqualified for potential employment during the lengthy pendency of litigation challenging the employment criteria causing his disqualification. In *Jenkins*, we held that the named plaintiff's acceptance of a promotion, subsequent to the filing of a complaint alleging racial discrimination in the company's promotional system, moots neither the individual claim nor that of the class. If an employer could negate an employee's standing to challenge discriminatory employment practices by the simple expedient of offering him unilaterally the relief he seeks for the class, the individual-initiated enforcement structure of Title VII would be seriously jeopardized. *Senter v. General Motors Corp.*, 532 F.2d 511 (6th Cir. 1976). The principle, however, does not apply to the instant facts. Plaintiffs, due to no act of Travenol, possessed tenth grade educations and therefore lacked standing at the time suit was filed.

This case must be distinguished from those in which the named plaintiffs may have little qualifications for a particular job, without regard to the disqualifying requirement they attack, such as the analyst jobs discussed in the portion of this opinion dealing with Travenol's college degree requirements. Here the named plaintiffs and each member of the class were qualified on the precise requirement which they seek to set aside.

Plaintiffs also attempt to establish standing by noting that during at least 80 of the 90 days preceding the January 19, 1970, filing of plaintiff Willie Mae Payne's first EEOC charge, she failed to satisfy the tenth grade education requirement. No evidence appears in the record to suggest that Ms. Payne applied for employment during this 80-day period. Plaintiffs argue that the question whether Ms. Payne applied is irrelevant in light of the recent Supreme Court case of *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), which holds that seniority relief should not be denied to a class member who did not apply for a job when applying would be futile because of the employer's discriminatory practices. In this case, however, the trial court's definition of the class removed from consideration all applications for employment submitted to Travenol prior to March 3, 1970, so that the situation prior thereto is irrelevant on this appeal.

Because we hold that plaintiffs lacked standing to challenge the tenth grade education requirement, we do not address Travenol's alternative contentions, first, that plaintiffs failed to prove the requirement had a disparate impact on blacks and, second, that the requirement was justified by business necessity.

Twelfth Grade Requirement

The third injunctive paragraph enjoins defendants from:

> (3) Requiring a twelfth grade education (or its GED equivalency) as a condition of employment in office, clerical, technician and supervisory positions in defendants' said facility.

In respect to his [sic] provision, defendants contend that the court measured the degree of disparate impact by an incorrect statistical referent. Travenol, citing *Robinson v. City of Dallas*, 514 F.2d 1271 (5th Cir. 1975), argues that

the trial judge should have drawn his statistics from Travenol's operative work force rather than the general population because most of the positions requiring twelfth grade educations are filled through the promotion of assemblers and material handlers. The evidence in this case, however, shows that although a large majority of the employees occupying positions subject to the twelfth grade requirement were promoted from operative jobs, a not insignificant number were hired from the general population. The trial court's consideration of general population data was therefore not improper. Evidence in the record amply supports the trial court's findings of disparate impact and lack of business necessity. The third paragraph of the injunction is therefore affirmed.

College Degree Requirement

The fourth injunctive paragraph enjoins defendants from:

> (4) Requiring a college degree as a qualification for the positions of systems, traffic, or scheduling analyst, in defendants' said facility.

Travenol challenges this part of the injunction on two grounds. First, it maintains that plaintiffs failed to prove the discriminatory impact of the college degree requirement. Travenol employed only five analysts subject to the college degree requirement and urges that positions having so few incumbents cannot properly be subject to statistical proofs of disparate impact. The proper focus when determining the disparate impact of an employment condition is on those excluded by the requirement, not on the number of positions to be filled as Travenol suggests. *See Green v. Missouri Pacific Railroad,* 523 F.2d 1290, 1294 (8th Cir. 1975). The record contains ample evidence that the college degree requirement, not adopted until 1968, rendered "ineligible [for employment] a markedly disproportionate number of Negroes . . . ." *Griggs v. Duke Power Co.,* 401

U.S. 424, 429, 91 S.Ct. 849, 852, 28 L.Ed.2d 158 (1971). The defendants failed to prove that the requirement was justified by business necessity.

Second, Travenol maintains that plaintiffs' class action cannot properly extend to the employment practices applicable to analyst positions. In short, Travenol argues that the level of capability required for these positions is such that, even absent the college degree requirement, plaintiffs would never be serious candidates for them. Even assuming that the named plaintiffs were not strictly affected by the college education requirement, this Court's policy regarding class actions in employment discrimination cases dictates that plaintiffs could properly challenge Travenol's college degree requirement. Plaintiff's action is an "across the board" attack on unequal employment practices alleged to have been committed by Travenol pursuant to a policy of racial discrimination. As parties who have allegedly been aggrieved by some of those discriminatory practices, plaintiffs have demonstrated a sufficient nexus to enable them to represent other class members suffering from different practices motivated by the same policies. *Barnett v. W. T. Grant Co.,* 518 F.2d 543 (4th Cir. 1975); *see Long v. Sapp,* 502 F.2d 34 (5th Cir. 1974); *Jack v. American Linen Supply Co.,* 498 F.2d 122 (5th Cir. 1974); *Johnson v. Georgia Highway Express, Inc.,* 417 F.2d 1122 (5th Cir. 1969).

The injunction entered by the district court is reversed as to paragraphs (1) and (2) and the fifth unnumbered paragraph relating to pregnancy disabilities, and said paragraphs are hereby vacated and deleted. The injunction is affirmed as to paragraphs (3) and (4). Each party will bear his own costs in connection with this appeal.

REVERSED AND VACATED IN PART AFFIRMED IN PART.

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

(Caption Omitted in Printing)

On Petition For Rehearing and Petition For Rehearing En Banc

March 23, 1978.

(Opinion Jan. 6, 1978, 5 Cir., 1978, 565 F.2d 985)

Before THORNBERRY, AINSWORTH and RONEY, *Circuit Judges.*

PER CURIAM:

The opinion of the panel is amended by withdrawing the following language appearing at 565 F.2d 898:

> Here, neither the named plaintiffs nor the class, which was defined to exclude black females lacking tenth grade educations, had standing to attack the tenth grade requirement.

and substituting therefor the following:

> Here, none of the named plaintiffs nor any member of the class had standing to challenge the tenth grade education requirement. From the class of "all past, present and future black female employees and applicants" the district judge excluded "all black female applicants who lack a tenth grade education or equivalency." Thus, unlike the situation presented by broadly defined Title VII classes without defined exclusions, no member of the class could claim to be aggrieved by the education requirement.

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the court having requested that the court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

STIPULATION EXHIBIT 4

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
46 North Third Street, Suite 1004
Memphis, Tennessee 30103

DISTRICT DIRECTOR'S FINDINGS OF FACT—REVISED

In Re:

Willie Mae Payne, Charging Party

vs.

Baxter Laboratories, Inc., Cleveland, Mississippi, Respondent

Case No. YME1-083

Date of alleged violation: Continuing
Date of filing of charge: March 3, 1970
Date of service of charge: May 28, 1970

1. The charge was filed within the time period as prescribed by Title VII.

2. At the time of filing, Respondent's Cleveland facility, which is the situs of the instant charge, employed over 1,000 persons.

3. Respondent is engaged in the manufacture of pharmaceutical and hospital supplies for sale and distribution in interstate commerce.

4. The Charging Party alleges that Respondent engaged in an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964 by refusing to hire her because of her Negro race.

5. The Charging Party said that on approximately January 20, 1970, she went to Respondent's Cleveland facility seeking employment and was told by one of Respondent's employees that she would have to be referred by the Mis-

sissippi State Employment Service before she would be given consideration for employment.

6. The Charging Party indicated that prior to her second attempt to acquire employment with Respondent, she was given a referral card by the Mississippi State Employment Service. The Charging Party said that upon arrival at Respondent's Cleveland facility, she completed an application. After completing the application, she was told by one of Respondent's employees that "we are not hiring now, I got your application and I'll let you know when we are."

7. The Charging Party said that she has been back to Respondent's Cleveland facility on several occasions seeking employment, but the Receptionist would tell her that they were not hiring and that Respondent's Interviewer was too busy to interview her.

8. The Charging Party said that none of Respondent's interviewers have ever interviewed her and Respondent still refuses to hire her.

9. Respondent indicates in its statement of position that the Charging Party "was not given an application upon appearing at our Cleveland, Mississippi plant on or about January 20, 1970, because she did not have a referral card from the Mississippi State Employment Service." Respondent then stated: "She was therefore referred to the Employment Service Office."

10. Respondent also indicated in its statement of position that "as a matter of course, persons entering the lobby and requesting employment are informed of the company's policy of accepting applications only from persons referred by the Employment Service. They are directed to go to the local office of the Service for further information. Upon verification by the Service of a potential applicant's meeting the company's minimum qualifications, the potential applicant is given a referral card and directed to return to the plant. Upon presentation of the referral card, the

applicant is given an application form to complete. After completing the form, the applicant is interviewed and told that the company will contact him (her)."

11. A review of the list of Caucasians hired during the period March 1, 1969 through February 28, 1970, shows that there were 36 full-time employees who were not referred by the Mississippi State Employment Services.

12. Respondent's list of Negro hires shows that of the 69 full-time employees hired, all were referred by the Mississippi State Employment Services.

13. Respondent then indicated, in its statement of position, that the Charging Party, "upon presentation of a referral card from the Employment Service, was given an application and interviewed."

14. One of Respondent's employees indicated that he interviewed the Charging Party. This employee also said that "I rated her as 'C', which means to drop from further employment consideration. 'I felt that' the Charging Party did not have the mental capacity to perform as a satisfactory employee. . . ."

15. Respondent indicates in neither its statement of position nor in any of its documents provided the Commission, that a specified "mental capacity" is a prerequisite of employment.

16. It is also noted that Respondent offered no explanation of how it measures "mental capacity."

17. A review of Negro Charging Party's personnel folder indicated that she was referred for employment with Respondent by the Mississippi State Employment Service.

18. A review of job orders on file with the Mississippi State Employment Service indicated that more than 540 persons were referred for employment with Respondent within six months of the Charging Party's making application for employment.

19. A review of the above-mentioned job orders also indicated that the educational requirement was "10th grade minimum" for positions in which approximately 534 persons were referred within a six month period of Charging Party's application.

20. A further review of the above-mentioned job orders indicated that, with the exception of janitorial and general labor positions, the educational requirement was "10th grade minimum" for all of Respondent's vacant positions within a six month period of Charging Party's application.

21. The Negro female Charging Party indicated that at the time of her making application for employment, she had a "10th grade" education as required by Respondent.

22. The Mississippi State Employment Service confirmed Negro Charging Party's statement regarding her educational level by indicating that the Charging Party "attained her GED of 10th equivalency on January 19, 1970, from Delta State College."

23. Of the more than 540 persons referred by the Mississippi State Employment Service for employment at Respondent's Cleveland facility, less than 9% of the referrals were Negro females.

24. All Negro females referred by the Mississippi State Employment Service for employment at Respondent's Cleveland facility were referred for "package solution" positions.

25. The Charging Party, a Negro female, was hired for none of the above-mentioned positions.

26. A review of the list of persons hired from March 1, 1969 through February 28, 1970, Respondent hired 450 persons, and of that number, only 74 were Negro.

27. Of the 450 persons hired, 284 were female with only 43 being Negro.

28. Respondent refused to provide the Commission a list of current employees which would have indicated the total number of Negro females employed by it and positions in which they are employed.

29. The Charging Party said that she knows of instances where Caucasians were hired by Respondent who were not required to take the qualifying test at the Mississippi State Employment Service Office and were not referred by the Employment Service, although she is required to take the qualifying test and be referred by the Employment Service.

30. Respondent indicated in its statement of position, that the Charging Party's statement "may be true." Respondent then added: "As part of our test validation program, we have accepted applicants without test. However, all of these employees were interviewed by the State Employment Service and presented referral cards.

31. An employee of the Mississippi State Employment Office stated that the above-mentioned validation studies "were started during April of 1969, and were to have been completed during August of this year."

32. Respondent provided the Commission for review, the personnel folders of three Caucasians who were hired by Respondent and were not required to take qualifying tests.

33. A review of personnel folders of the three Caucasians in question, indicated that these persons were hired after the above-mentioned validation studies were started.

34. A review of personnel folders of the three Caucasians in question, also indicated that none of the three Caucasians were referred by the Mississippi State Employment Service.

35. I find that the Charging Party was referred to Respondent for employment by the Mississippi State Employment Service.

36. I find that a vacancy existed at Respondent's Cleveland facility at the time the Negro female Charging Party was referred for employment by the Mississippi State Employment Service.

37. I find that Respondent requires an educational level of "10th grade minimum" prior to considering an individual for employment although it has not shown that the requirement is related to performance of the job.

38. I find that all Negro females referred by the Mississippi State Employment Service for employment as Respondent's Cleveland facility were referred for "package solution" positions.

39. I find that Respondent refused to provide the Commission a list of current employees which would have indicated whether Negro females are employed only in "package solution" positions.

40. I find that Respondent hires Caucasians who are neither referred by the Mississippi State Employment Service nor are required to take qualifying tests, while requiring Negroes to take these tests and be referred by the Employment Service.

41. I find, of the females hired during a twelve month period from March 1, 1969 through February 28, 1970, approximately 77% were Caucasian and 23% were Negro.

42. I find that Caucasian employees were hired by Respondent as full-time employees without having been referred by the Mississippi State Employment Service.

43. I find that Negro applicants were not hired unless referred by the Mississippi State Employment Services.

44. I find that Respondent offered no objective reason for refusing to hire the Charging Party.

Date: 3/15/71

/s/ George B. Miller, Jr.
for A. Keith McDonald
District Director

STIPULATION EXHIBIT 14

Field Director's Findings of Fact

Case No. YJA2-248

Charge Nos. TJA2-0622, TJA2-0623, TJA2-0624
TJA2-0625

Delilah Cherry, David Richardson, Hallie Williams,
Birdie Lee Griffin, Charging Parties,

vs.

Baxter Laboratories, Inc., Cleveland, Mississippi,
Respondent

Date of alleged violations: Continuing.

Date of filing of charges: August 15, 1970; amended January 12, 1971 (Cherry). August 18, 1970; amended January 13, 1971 (Richardson). August 28, 1970; amended January 12, 1971 (Griffin). January 13, 1971 (Williams).

Date of service of charges: March 27, 1972.

Summary of Charge

Charging Parties allege that Respondent has engaged in an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964 by refusing to hire them because of their race (Negro).

Jurisdiction

Respondent is engaged in the manufacture of pharmaceutical and hospital supplies for sale and use in interstate commerce and employs approximately 1150 persons. The charges were filed within the time prescribed by Section 706(e) of Title VII, as amended.

Charging Party Cherry
Summary of Contentions and Evidence

1. Charging Party states that after passing the General Educational Development Test and a manual dexterity test, she was referred to Respondent by the Mississippi State Employment Service in 1967. (C-1)

2. Charging Party alleges that she applied for work with Respondent, was interviewed, and was told that Respondent would get in touch with her if there were any openings. Charging Party alleges that she telephoned and visited Respondent from 1967 through 1970 without being hired. Charging Party alleges that Respondent has denied her employment because of her race (Negro), while hiring Caucasians. (C-1)

3. Respondent's director of employee relations contends that no applicant is rejected because of race but that rather other applicants are selected. He contends that when vacancies occur applications are reviewed with regard to education and prior experience and that the most qualified applicants are selected. (E)

4. Respondent contends that it has no record of Charging Party's application and that the state employment service states that it has no record of ever having referred Charging Party to Respondent. (E)

5. Charging Party submits a letter from a Negro witness who states that she was with Charging Party both at the state employment service office and at Respondent's office where, she states, they were both interviewed. (D)

6. Charging Party contends that when she contacted Respondent concerning employment in 1970, she was told that it would not be necessary for her to complete a new application because her application was still on file. (C-1)

7. An officer of the state employment service states that it has no records on Charging Party, but that if there were

any they could have been destroyed in 1970 due to the fact that at that time there were no restrictions on destroying records three years old or older. (G-5, E)

8. A review of the applications of 20 Caucasians selected at random from among those hired between July, 1971, and December 31, 1971, shows that five of these employees were not high school graduates. (G-5)

9. Respondent's records show that, of persons hired in 1967 who are still employed by Respondent, 23 percent are Negro; of those hired in 1968, 34 percent are Negro; of those hired in 1969, 27 percent are Negro; of those hired in 1971, 35 percent are Negro. Negroes represent 6 percent of the employees hired before 1965 and 14 percent of those hired before 1967. (G-6)

10. According to the 1970 U.S. Census Negroes comprise 61 percent of the population of the county in which Respondent is located. (X)

Charging Party Griffin
Summary of Contentions and Evidence

11. Charging Party alleges that after taking a manual dexterity test she was referred to Respondent in 1970 by the Mississippi State Employment Service, was interviewed by Respondent's personnel manager and was told that she would be contacted if an opening occurred. (C-3, B-4)

12. Charging Party alleges that since that time she has telephoned Respondent, and has on one occasion spoken to the personnel manager in person concerning employment, but has not been hired. Charging Party alleges that Respondent has denied her employment because of her race (Negro), while hiring Caucasians. (C-3, B-4)

13. Paragraph three is incorporated here by reference

14. Respondent's director of employee relations contends that he has no record of Charging Party's having applied prior to August 3, 1971. He further indicates that there

would be some question about hiring a person who had been hospitalized for arthritis in her knees and who said that it was too noisey at home and that she was nervous. (E, G-7)

15. Charging Party's application, a copy of which is submitted by Respondent, mentions the referenced medical condition of Charging Party, is dated August 3, 1971, and lists an eleventh grade educational level for Charging Party. (G-3)

16. Examination of the applications of 20 randomly selected Caucasians hired from July, 1971 through December 31, 1971, shows that four had suffered some physical ailment within the previous five years and that one of these had had surgery for the removal of cartilege from her knees. Four claimed no more than a tenth grade educational level. (G-4, G-5)

17. Respondent's employment supervisor states that applications are usually marked A, B, or C and that employees are selected from among the applications marked A or B. (E)

18. Charging Party's application does not include a letter designation, nor do the applications of two of the randomly selected Caucasians referenced above. (G3, G4, G5)

19. Respondent's records show that it interviewed 1011 persons for employment from April 1, 1971 through December 16, 1971 and that 41.8 percent of these persons were Negro. Of the persons hired during this period 34.5 percent were Negro.

20. Respondent contends that the relatively low percentage of Negro hires is due to its tenth grade educational requirement. The director of employee relations states that this requirement is a bona fide occupational qualification inasmuch as Respondent must be certain that its products are placed in the proper, and correctly labeled, bottles.

21. According to the 1970 Census, the median number of school years completed by females in the county in which Respondent is located is 9.0 years; for all males it is 8.3 years. For Negroes only, the school years completed are 6.6 for females and 5.3 for males. (K)

22. The Commission's investigator states that most of the work at Respondent's facility is done automatically by machines and that there are mechanical check points to insure that bottles are properly labelled. (E & I)

Charging Party Williams
Summary of Contentions and Evidence

23. Charging Party alleges that she was interviewed for employment with Respondent and promised work as soon as possible. She alleges that she has returned to Respondent's facility a number of times with no success in obtaining employment. Charging Party alleges that Respondent has denied her employment because of her race while steadily hiring Caucasians. (C2 & B3)

24. Paragraph three is incorporated here by reference.

25. Charging Party's application is dated December 18, 1969, and indicates that Charging Party had completed the tenth grade at a Mississippi junior high school. Her application is marked with the letter designation B. (G-2)

26. Respondent's director of employee relations states that Charging Party's education was considered questionable and that she was considered to be a marginal applicant. (E, G-1)

27. Ten of the 20 randomly selected Caucasians referenced above were hired from applications marked with the letter designation B. Respondent's employment supervisor indicates that employees are accepted from among the pool with B applications and does not indicate that a B application is considered marginal. Four of the referenced 20 ran-

domly selected Caucasians were hired with a tenth grade or lower education. (G-4, G-5)

Charging Party Richardson
Summary of Contentions and Evidence

28. Charging Party alleges that he was interviewed by Respondent's personnel manager and was told that he would be contacted if an opening occurred. Charging Party alleges that Respondent has denied him employment because of his race (Negro). B-2

29. Paragraph three is incorporated here by reference.

30. Charging Party's employment application, dated May 13, 1970, indicates that he completed the tenth grade in a high school in Missouri, and has held three previous jobs. The application carries the letter designation B. (G-1)

31. Respondent's director of employee relations indicates that the official who interviewed Charging Party had reservations about his educational experience and his having held a number of previous jobs; he further states that Respondent could find no record of the existence of one of the places of employ listed by the Charging Party. (E, G-7)

32. Ten of the 20 referenced randomly selected Caucasian employees were hired from applications with the letter designation B. Six of the 20 listed three prior jobs, and four of these employees had held jobs out of state, as did Charging Party. Four of the 20 Caucasians indicated no more than a tenth grade level of education. (G-4, G-5)

33. Applications of ten Negroes selected at random from among those hired from July, 1971 through December 31, 1971, show that eight are highschool graduates and that three of these had had some college experience. (G-5)

Findings of Fact

On the basis of the foregoing, I make the following findings of fact:

34. Charging Party Cherry was referred to Respondent by the state employment service in 1967. She had prior experience as a stock clerk and had a GED high school equivalency certificate.

35. Employment applications of Charging Parties and of Caucasians who were hired by Respondent indicate that all the Charging Parties had attained educational level equivalent or superior to those of Caucasians who were hired and that conditions similar to those which Respondent claims adversely influenced Charging Parties chances of hire, could be found among Caucasians who were hired.

36. A comparison of applications of Negro and Caucasian employees indicates that the Negroes hired, as a group, had higher educational attainments than the Caucasians hired.

37. Applications of Charging Parties and of half of the Caucasians whose applications were examined and who were hired were marked with Respondent's letter designating their relative merit as B.

38. A significantly smaller proportion of Negroes than are present in the population of the surrounding area apply for work with Respondent and still smaller percentage is hired. Respondent maintains a tenth grade education requirement which can be met by proportionately fewer Negroes than Caucasians in Boliver County.

Date: 6/16/72

Evelyn Falkowski (Ms.)
District Director

STIPULATION EXHIBIT 13

February 9, 1973

In reply refer to: Case No. YJA2-248

Delilah Cherry
1539 Arnold
Cleveland, Mississippi 38732

Birdie Lee Griffin
1017 Lincoln Avenue
Cleveland, Mississippi 38732

Hallie Williams
712 Lee Street
Cleveland, Mississippi 38732

David Richardson
P.O. Box 24
Merigold, Mississippi 38759

Charging Parties

Baxter Laboratories, Inc.
Cleveland, Mississippi 38732

Respondent

DETERMINATION

Under the authority vested in me by Section 1601. 19b of the Commission's Procedural Rules, 37 Fed. Reg. 20.165 (September 27, 1972) I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

Respondent is an employer within the meaning of Title VII, and the timeliness and all other jurisdictional requirements have been met.

Findings of Fact were issued in the instant case on June 16, 1972. Respondent filed exceptions on August 28, 1972. I have considered the entire record including exceptions.

On the basis of evidence cited in the Findings of Fact, I conclude that Charging Party Cherry applied for work with Respondent originally in 1967. (See Findings paragraphs five, seven, and 34).

I conclude that there is insufficient evidence to determine whether or not Charging Party Griffin applied prior to August 3, 1971. I conclude that the remaining Charging Parties applied on the dates shown on their applications.

Evidence developed by the investigation and cited in the Findings of Fact show that all of the Charging Parties had attained educational levels equivalent or superior to those of some Caucasians who were hired by Respondent. The record also indicates that conditions similar to those which Respondent claims adversely influenced the Charging Parties' chances of hire could be found among Caucasians who were hired.

Statistics developed by the investigation further showed that blacks hired, as a class, had higher educational attainments than whites hired during the same sample time period.

Respondent's records further indicate that 23 percent of its employees hired in 1967 are blacks, 27 percent of those hired in 1969 are black, 24 percent of those hired in 1970 are black and 35 percent of those hired in 1971 are black. Blacks comprise 61 percent of the population of the area in which Respondent is located. During a sample period, blacks represented approximately 42 percent of the persons applying for jobs.

The Commission has previously determined that Title VII permits the use of statistical evidence to infer the existence of a pattern or practice of discrimination. See Commission Decision 72-0676, CCH Employment Practices Guide para. 6325.

The Commission has also determined that, where similarly situated persons of different races are differently

treated, it is reasonable to infer, in the absence of another acceptable explanation, that race was a factor in the dissimilar treatment. See Commission Decision 71-1683, CCH Employment Practices Guide para. 6262.

On the basis of the statistical and comparative data presented above, I conclude that reasonable cause exists to believe that Respondent denied the Charging Parties employment due to their race, in violation of Title VII.

Like or related to the charges is the consideration of Respondent's educational requirements. It is undisputed that Respondent requires that persons hired have at least a tenth grade education.

According to the 1970 U.S. Census the mean number of years of school completed by persons 25 years old or older in Mississippi is 12.1 for whites and 7.5 for blacks. The figures indicate that proportionately fewer blacks than whites can meet Respondent's educational requirements.

Respondent contends that its educational requirement is necessary for the safe and efficient operation of its business, stating that the label coding on its solution bottles cannot be mechanically checked, that its mechanical check points are not infallible and that consequently alertness and complete knowledge and understanding of the label and coding processes are required of its line operators. Respondent states that other important and significant tasks are required of its line operators.

Respondent does not present any documentary or other evidence to support its claim that its educational requirements are necessary for all of its production positions, nor does it contend that any other employee selection method which might prove not to have the discriminatory impact of its education requirement has been tested or would be impossible to develop.

Respondent has failed to demonstrate that alternative suitable hiring procedures are unavailable for use. Respondent's educational requirements have not been shown to bear a demonstrable relationship to successful performance of the jobs for which they are used. In the absence of such showings, I conclude that there is reasonable cause to believe that Respondent's educational requirement discriminates against blacks because of their race, in violation of Title VII. See Commission Decision 72-0591, CCH Employment Practices Guide para. 6314 and Commission Guidelines on Testing CCH Employment Practices Guide para. 4010.

Like or related to the issues discussed above is the question of whether Respondent violates Title VII by maintaining segregated job classifications. The record indicates that Respondent maintains at least 39 job classifications which are segregated by race and/or sex. All managers and officials are of one race (white) and sex (male). Clerical positions are filled by members of one race (white). Professional and craftsmen (skilled) positions do not include any black female employees. Respondent's "Assembler" job category contains only females, and the "Material Handler" job has 207 males but only five females.

On the basis of the statistical evidence presented, I conclude that reasonable cause exists to believe that at least at the time of the investigation it was Respondent's policy to segregate some or all of its job classifications on the bases of race and sex.

Having determined that there is reasonable cause to believe that Respondent has engaged in unlawful employment practices, the Commission now invites the parties to join with it in a collective effort toward a just resolution of this matter. We enclose an information sheet entitled "Notice of Conciliation Process" for the attention of each

party. A representative of this office will be in contact with each party in the near future to begin the conciliation process.

On behalf of the Commission:

District Director

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

(Caption Omitted in Printing)

Order

Pursuant to the Memorandum of Decision this day released in the above numbered and captioned action, it is

ORDERED:

1) That the motion of defendants to dismiss and/or for summary judgment shall be, and the same hereby is, in all respects overruled and denied;

2) That the motion of defendants for an order defining and limiting the class which plaintiffs may represent in the action sub judice shall be, and the same hereby is, denied and overruled;

3) That the motion of plaintiffs to certify this action as a proper class action pursuant to Rule 23(c)(1), F. R. Civ. P. shall be, and the same hereby is, sustained;

4) That the class to be represented by the plaintiffs herein shall be, and the same hereby is, initially defined as,

> All present, past and future black employees and all past and future black applicants for employment at the facility operated by defendants, or either of them, at Cleveland, Mississippi, subject, however, to this limitation, that is to say, all black employees of defendants and all black applicants for employment at said facility, prior to March 3, 1970 are excluded from the class.

5) That the portion of this order defining the class which may be represented by plaintiffs in this action is

conditional and the court reserves the right to alter or amend the same at any time and on as many occasions as the court may find proper before the decision on the merits, and to create such subclasses as the evidence received, or to be received, in this action may require.

This, the 16th day of November, 1972.

/s/ ORMA R. SMITH

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

(Caption Omitted in Printing)

Order

The matters determined herein having been fully briefed and orally agued by the parties and the Court being fully advised in the premises, it is hereby

ORDERED:

1) That the motion of plaintiffs and plaintiff-intervenors to amend the time limitations in the initial definition of the racial class filed September 20, 1973 shall be, and the same hereby is, denied and overruled;

2) That the motion of plaintiffs and plaintiff-intervenors to define the sex class filed November 12, 1974 shall be, and the same hereby is, denied and overruled;

3) That the motion of defendants to redefine the class filed November 1, 1974 shall be, and the same hereby is, granted and sustained;

4) That the class to be represented by plaintiffs and plaintiff-intervenors herein shall be, and the same hereby is, defined as,

> All present, past, and future black female employees and all present, past and future black female applicants for employment at the facility operated by the defendants at Cleveland, Mississippi, subject, however, to this limitation, that is to say, all black female applicants for employment at said facility prior to March 3, 1970, and all black female employees whose employment terminated prior to March 3, 1970, are excluded from the class; the class shall be subject to the further limitation that all black female applicants

who lack a tenth grade education or equivalency or who were not referred for employment at the Cleveland facility by the Mississippi State Employment Service during the period such referral was required, are excluded from the class.

5) That the portion of this Order defining the class which may be represented by plaintiffs and plaintiff-intervenors in this action is conditional and the Court reserves the right to alter or amend the same at any time and on as many occasions as the Court may find proper before the decision on the merits, and to create such subclasses as the evidence received, or to be received, in this action may require.

6) That the plaintiffs and plaintiff-intervenors give the best notice practicable of this Order to each person whom they claim to be within the definition of the class as set forth in Paragraph 4 of this Order. Said notice shall be given by first class mail, postage prepaid, no later than January 1, 1975, to each such person whose name and address is known to plaintiffs and plaintiff-intervenors or to their counsel, or whose identity can be ascertained with reasonable effort through the inspection of defendants' files. Notice to such persons whose names and addresses are unknown to plaintiffs and plaintiff-intervenors or to their counsel and whose identities cannot be ascertained by reasonable effort, shall be given by publication of notice three (3) times in three (3) consecutive weeks in The Bolivar Commercial News, the first publication to be made no later than January 1, 1975. Both individual and public notice shall be in the forms which are attached to this Order as Exhibits A and B and which are hereby approved by the Court.

7) On or before March 1, 1975, counsel for plaintiffs and plaintiff-intervenors, after consultation with counsel for defendants and after obtaining any necessary information from the Clerk of this Court, shall prepare and submit to this Court a list of all persons who have indicated their wish not to participate in this action by so responding to the notice described in Paragraph 6 of this Order and a list of all other persons to whom said notice was sent; said counsel shall also submit to this Court proof of publication of notice as set forth above.

ORDERED. This 20th day of December, 1974.

/s/ ORMA R. SMITH

United States District Judge

Approved as to form:

/s/ RICHARD T. SEYMOUR
Counsel for plaintiffs and plaintiff-intervenors

/s/ ROBERT S. LASKY
Counsel for defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

(Caption Omitted in Printing)

Memorandum of Decision

Following a two-week bench trial, this employment discrimination action is now before the court for decision on the merits.

The suit was commenced March 2, 1972, by the filing of complaint by three individual plaintiffs seeking to represent a class of persons allegedly subjected to racial discrimination at the hands of the defendants. The scope of the plaintiff class was subsequently broadened by the addition of allegations of sex discrimination. Of the original named plaintiffs, one was a black, male employee at defendants' Cleveland, Mississippi, facility and two were black, female applicants for employment at the defendant's Cleveland plant.

Defendants in the case are Travenol Laboratories, Inc., and Baxter Laboratories, Inc. Because Travenol is a wholly-owned subsidiary of Baxter, the court will make no attempt to differentiate between the defendants and will refer to them indiscriminately as "Travenol", "Baxter", or simply "the defendants".

The course to trial and determination on the merits was long and arduous. During the months following the filing of complaint, the court was required to rule upon a motion to strike jury demand (which was granted), a motion to certify as a class action (which was granted), a motion to dismiss and/or for summary judgment (which was denied), a motion for a preliminary injunction (which was denied) and various other motions concerning discovery and the substitution of parties. On or about November 15, 1973, counsel approached the court and requested pro-

ceedings in the case be held in abeyance pending the outcome of settlement negotiations. Negotiations dragged on until June of 1974, at which time they collapsed.

During the summer of 1974, the parties resumed vigorous discovery. The court bifurcated the trial of the case, deferring consideration of the appropriate relief to be afforded plaintiffs, if any, until after the court had determined if defendants' conduct about which plaintiffs complained is or was in contravention of Title VII of the Civil Rights Act of 1964.[1] The liability portion of the trial began March 3, 1975, and concluded March 14, 1975. However, the end of the trial unfortunately did not mark the end of the litigation of the matter of liability. Voluminous and time-consuming post-trial motions filed on behalf of both plaintiffs and defendants required disposition by the court prior to consideration of the merits.

In the course of the three-year period between filing of complaint and commencement of trial, the cast of the named plaintiffs changed substantially. Two of the original named plaintiffs, James Williams and Alma Jean Williams, sought and received permission of the court to withdraw as parties. Willie Mae Payne remains the only original named plaintiff in the lawsuit. In 1973, the court sustained a motion for leave to intervene filed on behalf of Delilah Cherry and Birdie Griffin. Thereafter, the case proceeded to trial with Ms. Payne, Ms. Cherry, Ms. Griffin, and the class which they represent opposing the defendants, Travenol and Baxter.

Although she has since moved to Chicago, Illinois, Willie Mae Payne was, at the times pertinent to the issues now before the court for determination, a black female resident of the Cleveland, Mississippi area in which the defendants' facility is located. There was some controversy

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[1] 42 U.S.C. § 2000(e) *et seq.*

as to when Ms. Payne initially applied for employment at the Baxter plant; however, the parties have stipulated that she did so at least as early as March 17, 1970. Although Ms. Payne has no more than seven years of formal schooling, she obtained a tenth grade rating on the General Educational Development (GED) test on January 19, 1970. Ms. Payne was never hired by the defendants.

Delilah Cherry is a black female resident of the Cleveland, Mississippi area. At the time Ms. Cherry claims she was subjected to discrimination at the hands of the defendants, she had completed only eight years of formal education and had obtained a certificate of tenth grade equivalency on a GED test in 1967. Although she initially sought employment at the Baxter plant at least as early as 1970,[2] Ms. Cherry had no success in obtaining a job with the defendants until some time after the institution of the instant litigation. She is presently employed by the defendants.

There was a degree of confusion as to the facts surrounding the claim of plaintiff Birdie Lee Griffin. Prior to trial, counsel stipulated as to certain facts concerning Ms. Griffin. When Ms. Griffin testified at the trial, it developed from her testimony that the Birdie Lee Griffin who was the subject of the stipulations was the daughter and namesake of the Birdie Lee Griffin who was a witness

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[2] As will be discussed in greater detail *infra*, until November 5, 1971, the personnel department at Travenol would consider job applications only from persons who were referred to them from the local office of the state employment service. The attempts of Ms. Cherry and Ms. Payne to secure employment at Travenol were initially thwarted by the refusal of the employment service to refer plaintiffs to defendants. Ms. Payne and Ms. Griffin went to the state employment office initially to seek employment at Travenol. Ms. Cherry went directly to Travenol in the first instance but was instructed that defendants hired only employment service referrals. The plaintiffs were ultimately referred to Travenol, but only Ms. Cherry was successful in obtaining employment.

and party in this cause. Accordingly, the facts set forth in the stipulations as to Ms. Griffin have no application to this lawsuit.

The correct facts, as the court finds them to be from her testimony at trial, are that Birdie Lee Griffin is a forty-eight year old black woman currently residing in the Cleveland, Mississippi area. Ms. Griffin completed eleven years of formal education and has attained a twelfth-grade equivalency on the GED. Ms. Griffin first applied for a job with Travenol in 1966. Although she was referred to Baxter by Mississippi State Employment Service (MSES), Ms. Griffin was never offered a job at the Cleveland plant.

Each of the named plaintiffs filed discrimination charges with the Equal Employment Opportunity Commission (EEOC). Ms. Payne lodged two charges, one each in February and March of 1970. Named as respondents in these charges were Baxter Laboratories and MSES. These charges related primarily to Travenol's education requirement, the use of MSES as an exclusive source of applicants, and claims of racial discrimination. The EEOC investigated Ms. Payne's allegations and, on March 15, 1971, issued findings of fact to the effect that reasonable cause existed to believe that Baxter's practices resulted in discrimination against blacks substantially as alleged by Ms. Payne. A right to sue letter was issued Ms. Payne on December 28, 1971, as to MSES, and on September 6, 1972, as to Baxter.

Ms. Cherry also filed two charges with the EEOC naming Baxter and MSES as respondents. The first charge, lodged August 14, 1970, inferred that white job applicants at the Travenol plant were preferred to black. The second charge, signed by Ms. Cherry on January 12, 1971, contained only the simple allegation that Travenol refused to hire Ms. Cherry because she is black. The EEOC investigation conducted in response to Ms. Cherry's charges re-

sulted in a finding that reasonable cause existed to believe Travenol was then engaged in unlawful employment practices. This finding was based almost entirely upon Travenol's requirement that each job applicant possess at least a tenth grade education or an equivalent score on the GED test. A right to sue letter was issued to the attorney for Ms. Cherry by EEOC on June 6, 1973.

Ms. Griffin filed two charges against Baxter with the EEOC. The first was received by the Commission on August 28, 1970, and the second was executed by Ms. Griffin on January 12, 1971. Both of Ms. Griffin's charges related to racial discrimination. She received a right to sue letter, through her attorney, from EEOC on June 6, 1973.

In their complaint, plaintiffs sought injunctive relief and damages in the nature of back-pay to remedy what they allege is defendants' past, present, and future discrimination against blacks and women. Plaintiffs maintain that the defendants' use of the tenth grade education requirement violates Title VII insomuch as the requirement has a distinctly disparate effect on blacks in the Cleveland, Mississippi area and cannot be justified as a business necessity. Plaintiffs also attack what they claim was defendants' practice of restricting the better-paying jobs to male employees. In conjunction with this allegation, plaintiffs maintain that the preservation of separate seniority rosters in the two classifications of defendants' production-line workers[3] discourages inter-job transfers and perpetuates the effects of past discrimination. Plaintiffs also included in the complaint a charge that the manner in which Travenol management hires and promotes its clerical and professional staff unlawfully discriminates against blacks.

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[3] As will be discussed in greater detail *infra*, Travenol groups its production line workers into "assemblers" and "material handlers". The proof in the case shows that material handlers are substantially better paid than assemblers.

As was indicated earlier, the court certified this action as one which may be maintained on behalf of a plaintiff class as required in Fed. R. Civ. P. 23(c) and tentatively defined the class as follows:

> All present, past, and future black female employees and all present, past, and future black female applicants for employment at the facility operated by the defendants at Cleveland, Mississippi, subject, however, to this limitation, that is to say, all black female applicants for employment at said facility prior to March 3, 1970, and all black female employees whose employment terminated prior to March 3, 1970, are excluded from the class; the class shall be subject to the further limitation that all black female applicants who lack a tenth grade education or equivalency or who were not referred for employment at the Cleveland facility by the Mississippi State Employment Service during the period such referral was required, are excluded from the class.

Although perhaps not strictly necessary, the court deemed it desirable that, pursuant to Fed. R. Civ. P. 23 (c)(2), notice be furnished members of the above-defined class. The notice was through the mail to those whose identities were known to plaintiffs' counsel, and through publication to those unknown to counsel. It appears that approximately 1300 class members received notice of the pendency of the action through the mailing. Because some of the responses to the notice evince as apparent misunderstanding as to the basic nature of the matter, both plaintiffs and defendants moved the court to require some additional or supplemental notice to prospective class members. Defendants sought to have the court modify the class notice from the "opt-out" to the "opt-in" form. Plaintiffs requested a "clarifying notice" be sent to each of the approximately 400 members of the plaintiff class who had responded to the court's original notice by seeking exclu-

sion from the class. The court determined to follow neither course proposed by counsel but, instead, entered an order deferring consideration of the advisability of requiring an additional class notice until such times as the question of the defendants' liability has been resolved.

Race Discrimination

Baxter's involvement in Mississippi began in 1950, when, pursuant to a legislative program of the State of Mississippi designed to encourage the immigration of industries into the state (Balance Agriculture With Industry—BAWI), the defendants established a facility in Cleveland, Mississippi. Construction and periodic expansion of the Cleveland plant was financed in part through bonds issued by the City of Cleveland under the BAWI program. Approval by the city voters was a prerequisite to participation in the BAWI program. A good relationship between Travenol management and employees and the political, economic, and social leaders of the community was therefore essential to the successful operation of the Travenol plant in Cleveland.

From the commencement of operations in 1950, the defendants' Cleveland plant has manufactured, processed, packaged, and distributed drug and pharmaceutical products, with an emphasis on parenteral fluids and intravenous solutions. These products are used by hospital and medical facilities throughout the Mid-South.

Travenol's products are packaged and labelled on an assembly line along which the bottles are filled with various solutions. Production line workers are referred to as "assemblers". Assembler positions by and large involve the filling, capping, labelling, and inspection of bottles as they move along the production line. A second type of production line worker is known as a "material handler". The material handler job consists primarily of coordinating the flow of materials along the assembly line and the distribu-

tion of materials to various work stations along the line in accordance with production schedules.

Of the approximately 1200 persons employed at the Travenol plant in Cleveland, some 900 occupy either assembler or material handler positions.

The employment practices attacked in the complaint have evolved since defendants' Cleveland facility began operation in July of 1950. From 1950 until 1966, Mr. Olin Taylor was employed as personnel manager at the plant. During this period, he personally hired all custodians, material handlers, and assemblers. During his tenure as personnel manager, Mr. Taylor received no written instructions from Baxter management as to the standards which he was to employ in deciding which applicants to hire. His decisions were based mainly upon subjective factors and community references or recommendations played an important role in the hiring process. The most frequent source of references and recommendations was the industrial development committee of the Cleveland Chamber of Commerce. There were no blacks on this committee during the periods when it made references or recommendations. References were given heavy emphasis until the late 1950's or early 1960's, at which time their importance began to decline.

When Mr. Taylor began to rely less upon community references and recommendations in the late 1950's or early 1960's, he concurrently began to rely more heavily upon his own subjective judgment in determining whether to accept an applicant for employment. One of these subjective factors was Mr. Taylor's belief that close relatives of an employee with a good record would likely be good employees and, conversely, close relatives of an employee with a poor work record would likely be poor employees.

Prior to 1964, the defendant's work force was composed entirely of whites except for custodial or janitorial jobs.

This exclusion of blacks from noncustodial jobs was based in part upon conformity to local racial traditions.

At some point during 1964, and subsequent to the passage of Title VII, Mr. Taylor requested the Cleveland office of MSES to perform a survey of the noncustodial jobs at the Travenol plant and to recommend changes or alterations to the hiring process which would bring blacks into noncustodial positions and jobs as operatives on the production line. Following their study, MSES recommended that the defendants impose a requirement that prospective applicants possess at least a twelfth grade education. Mr. Taylor rejected this recommendation as too restrictive and, instead, Travenol adopted a tenth grade standard for prospective employees. A tenth grade GED equivalency would also satisfy this requirement.

At the time of the imposition of the tenth grade requirement, February of 1965, Travenol employed four blacks as material handlers. Each had been promoted from a custodial position to a position on the production line. The defendants had not, prior to 1965, initially hired any blacks as operatives.

In February 1965, Mr. Taylor determined to use MSES as the exclusive referral source for applicants for assembler and material handler positions at the Travenol plant. Prospective employees directly contacting the personnel office at the plant were instructed to report to the MSES office to initiate the application process, inasmuch as the personnel department would not consider an applicant not referred by the Cleveland office of MSES.

Prospective employees satisfying the MSES standards, including the tenth grade requirement, were referred to the Travenol plant for an interview with Mr. Taylor. The impression which Taylor gained at this interview, coupled with the recommendation of plant employees, determined the applicant's success or failure in landing a job with

Travenol. Between 1965 and 1971, the defendants customarily contacted one of their black employees, Julius Lucas, to ascertain his opinion of prospective black employees.

In 1967, Mr. Taylor was succeeded as personnel manager by James K. Lesley. Mr. Taylor supplied Mr. Lesley with the names of persons in the local community who could serve as references for job applicants. Lesley's tenure with Travenol was brief, terminating in April 1968. Mr. Lesley was succeeded as personnel manager by James E. Self on July 15, 1968. Mr. Taylor, who was still in defendant's employ, did not give Mr. Self instructions as to how to conduct interviews with applicants since he considered Mr. Self's background in personnel matters sufficient for performance of the duties of personnel manager at the plant. Mr. Self served as personnel manager at the Cleveland plant from July 15, 1968 to August 31, 1974.

During Mr. Self's tenure, hiring decisions as to persons referred by MSES were based primarily on subjective factors. The qualifications considered included personal cleanliness, general alertness, and comprehension. The personnel manager did not have one set of interview questions which he used in each and every interview, the questions asked varied among the applicants.

Although Travenol abandoned its policy requiring that all applicants for jobs as operatives be referred by MSES in the Fall of 1971,[4] it has continued in effect the tenth grade education requirement for operatives on the production line.

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[4] In response to information received by defendants' attorneys to the effect that a lawsuit would soon be initiated charging that MSES's Cleveland office referred job applicants in a racially discriminatory manner, defendants notified MSES on November 5, 1971, that Travenol would no longer utilize the services of MSES.

The greater portion of the evidence offered at the trial, including expert testimony, tables, and statistical displays, was addressed to the issue of the effect of the tenth grade education requirement. Statistics of all kind and expert analysis of statistical evidence ad infinitium were received into evidence. The voluminous nature of the documentary evidence thus introduced, as well as counsels' heated debate as to the proper interpretation of each item in evidence tended to confuse rather than enlighten. To engage in an extensive discussion of the evidence in this regard would result in an opinion beyond all reasonable bounds. Accordingly, the court's discussion of the issue will be brief and to some extent conclusory.

RACIAL EFFECT OF TENTH GRADE EDUCATION REQUIREMENT

Lamentations aside, it falls to the court to determine, in reverse order, whether the defendants' educational requirement has been "shown to be significantly related to successful job performance" and whether the requirement "operate[s] to disqualify Negroes at a substantially higher rate than white applicants". Griggs v. Duke Power Co., 401 U.S. 424, 426, 28 L. Ed. 2d 158, 161, 91 S. Ct. 849 (1971).

Because there are no available U.S. Census Bureau figures showing the number of blacks and whites in Mississippi with ten or more years of education, the parties stipulated that the relative racial effect of the tenth grade requirement used by defendants is as great as the relative effect of a ninth grade requirement. Using the ninth grade figures, the 1970 census report for the State of Mississippi clearly shows the education requirement has a substantially disproportionate adverse effect upon blacks. In the county in which defendant's plant is located, for example, 81.6% of the black males in the county over 25 years of age had less than 9 years of education. Of the black females in the county over 25, 72.9% had fewer than

9 years of education. The comparable figures for whites were 29.6% for males and 20.8% for females.

Defendants' only attempt to blunt the effect of the Census Bureau figures was to speculate that the educational gap between blacks and whites would be considerably narrower if figures were available which included GED equivalencies in addition to formal education. No concrete proof was offered in support of this contention and the court is not inclined to believe, absent some showing, that blacks would avail themselves of the GED program to a greater extent than whites in numbers so large as to significantly reduce the great disparity apparent in the Census Bureau figures. Considering all the evidence, the court has concluded that plaintiffs have shown in a most convincing manner that Travenol's tenth grade or equivalency requirement disqualifies substantially more black applicants than white.

As might be expected, the majority of proof introduced by defendants was in support of their assertion that the nature of the product manufactured by them at their Cleveland plant dictates a literate and alert work force, a condition which can be assured only through use of a screening process which includes the tenth grade education requirement. Simply stated, defendants claim the requirement is a business necessity. In the opinion of the court, the proof in the case shows otherwise.

Assemblers and material handlers work from place to place on the production line and must be familiar with each job involved. They are required, at times, to keep records and to add, subtract, and multiply. They must be alert, attentive, flexible and must be able to read, with an understanding of what they have read, and to follow instructions. Generally, material handlers and assemblers learn their respective duties from on-the-job training. The parties stipulated that the operative positions do not re-

quire any particular sort of previous employment on the part of the incumbent.

It is defendants' position that the high speed of the production line on which the bottles are filled with the intravenous solutions requires a particular alertness and attentiveness on the part of the employee assigned to line operations. Decisions affecting quality must be made quickly as the production line progresses. Accordingly, defendants maintain that operatives must possess sound judgment in order to appreciate the potential consequences of their actions.

Because of the nature of their product and its intimate effect on human life, Travenol management has made every attempt to build quality control consciousness into each job at the plant. The potentiality for disaster inherent in a mislabelled product in the drug industry dictates use of the tenth grade requirement as a necessary and effective screening device for the selection of competent employees, so defendants argue. Turning again to *Griggs*, the court finds the following language from that opinion highly instructive on this point:

> "Nothing in [Title VII] precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." 401 U.S. at 436, 28 L. Ed. 2d at 167.

After a full consideration of all of the evidence on the issue, the court is of the opinion, and so holds, that Travenol's tenth grade educational requirement does not measure the person for the operative job at its Cleveland plant.

Every condition of liability set forth by the Court in *Griggs* is to be found in this case. That is, the operative jobs at defendants' plant were reserved exclusively for and occupied exclusively by whites prior to passage of Title VII. The education requirement without question has a substantially more adverse effect upon black applicants than upon white applicants. And, from a familiarity with the nature of the operative jobs at the Travenol plant acquired through two weeks of hearings on the matter, the court is convinced the educational requirement has not been "shown to be *significantly* related to successful job performance." *Griggs, Supra,* 401 U.S. at 426, 28 L. Ed. 2d at 161 [emphasis added].

In concluding that the education requirement is not job related, the court considers it highly pertinent that the standard was not adopted until the defendants began desegregating their work force in order to comply with the Civil Rights Act of 1964. United States v. Georgia Power Co., 474 F. 2d 906, 912 (5th Cir. 1973).[5] Although the Cleveland plant had operated successfully for more than fifteen years without an educational policy of any sort in regard to the employment process, in 1965 Travenol de-

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[5] Although not cited as frequently in this opinion, the *Georgia Power* opinion was actually of more benefit to the court in determining the merits in this case than was the *Griggs* opinion. First, the defendants in *Georgia Power* actually presented a business necessity defense, something which was merely contemplated by the Court in *Griggs*. Second, the *Georgia Power* opinion dealt specifically with a minimum education requirement, 474 F. 2d at 918-19, whereas *Griggs* dealt principally with a requirement of a minimum score on an ability test.

termined to establish the tenth grade requirement for all noncustodial jobs, including the assembler and material handler positions which make up more than three quarters of Travenol's entire work force.

The court is also assisted in reaching a decision on the legality of defendants' education requirement by consideration of the EEOC's own guidelines concerning educational prerequisites for employment.[6] Application of the EEOC's interpretation of Title VII to the facts in the case at bar, as the court finds them to be, likewise compels a holding that the use of the tenth grade requirement constitutes unlawful discrimination against black applicants or prospective black applicants at defendants' Cleveland facility. 29 C.F.R. § 1607.1 *et seq.*

The court's holding is not to be interpreted as precluding defendants from adopting methods of testing or other measuring procedures to predict an applicant's ability to effectively perform the duties of an operative at defendants' plant. The court appreciates the fact that personnel assigned to these positions must be able to read with some degree of comprehension and be capable of performing certain mathematical calculations. However, where, as here, the crude benchmark selected by an employer to insure employees possess the ability to read and write and add and subtract operates to substantially and disproportionately burden minority applicants and has been shown to relate to job performance in only the most remote sense, use of that benchmark is proscribed by Title VII.

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[6] "The administrative interpretation of [Title VII] by the [EEOC] is entitled to great deference." *Griggs, supra,* 401 U.S. at 433-34, 28 L. Ed. 2d at 165.

THE OVERALL EFFECT OF DEFENDANTS' HIRING PRACTICES FOR OPERATIVE POSITIONS

The record reflects that once an applicant for an operative job at Travenol has hurdled the tenth grade barrier, the hiring decision is based primarily on subjective factors. These job decisions are made by defendants' personnel managers without written instructions or directives from corporate headquarters. Among applicants for these positions who met the requirement of referral by MSES while it was in effect, the defendant hired proportionately fewer blacks. Defendants' records reflect that for the period from April, 1971 through August, 1974, one of every three white applicants for operative positions at Travenol was hired, but only one of every six black applicants was hired. This disparate result reflects the combined effect of a tenth grade requirement and of the defendants' subjective discrimination.

The defendants' records indicate that in May, 1964, all operatives were of the white race. By March of 1966, more than a year after the implementation of the tenth grade education requirement and nearly two years after the passage of the Civil Rights Act of 1964, the defendants' operative force was still approximately 84% white. In February of 1969, the picture had not changed to any substantial degree and 82% of the male operatives were white while 89.8% of the female operatives were white. In March, 1970, during the period in which the EEOC charges which are pertinent to this case were lodged against defendants and at a time when the charges were under investigation by the EEOC, the company's records show that 76.6% of the male operatives were white and 82.8% of the female operatives were white.

The racial makeup of Travenol's operative force changed significantly between 1970 and 1973. By March of 1973, 54.1% of the male operatives were white and 70.1% of the female operatives were white. The court cannot ignore the

implication that the real incentive for the meaningful progress in intergration of the operative work force which the defendants achieved between 1970 and 1973 was furnished by the plaintiffs' charges with the EEOC and the subsequent institution of this lawsuit.

By February of 1974, 37.4% of the defendants' male operatives were white as were 57.5% of the female operatives. The 1970 Census Report indicates that in Bolivar County whites comprised 52.2% of the male population 18 years of age and older and 46.2% of the female.

While the above figures disclose a commendable degree of progress by the defendants, especially in the very recent past, in bringing blacks into the operative work force in numbers approaching the racial composition of the community, they also disclose significant underrepresentation of blacks in the operative work force during the early years in dispute in this case, 1970 and 1971.

Twelfth Grade Requirement

The defendants presently require a twelfth grade education for all office and clerical jobs, which include mail room duplicating clerk, telephone operator/receptionist, secretary, inventory clerk, accounting clerk, steno-clerk, and keypunch and data processing operator. The twelfth grade education requirement also applies to all technician jobs in the plant, including maintenance scheduler, molding technician, release coordinator, release coordinator (solutions), pharmaceutical chemical laboratory technician, chemical plant laboratory technician, standard technician in the industrial engineering department and molding specialist. Also subject to the twelfth grade requirement are apprentice mechanic jobs of all kinds, although the requirement does not apply to persons who have completed a course of training in a vocational-technical school, or to

persons with military experience in mechanical fields. All supervisory jobs, from group leader up, require a high school diploma, including the operative supervisors.

The defendants have not validated, in accordance with the EEOC or the Office of Federal Contract Compliance (OFCC) guidelines, the twelfth grade education requirement now in effect at their Cleveland plant.

Although there is a substantial turnover among office and clerical employees, these jobs have, since the opening of the plant, been held exclusively or disproportionately by whites. The precise date of the adoption of the twelfth grade requirement is unclear; however, it was adopted sometime subsequent to passage of the Civil Rights Act of 1964. Incumbent employees are not required to satisfy the education requirement as a condition of continued employment. It goes without saying that the beneficiaries of that policy were and are overwhelmingly white.

The court must, of course, approach the issue of whether defendants' high school diploma requirement contravenes Title VII in the same manner as the legality of the tenth grade requirement was approached.

The question of whether the diploma requirement operates to disqualify blacks in substantially greater numbers than whites is, as was the same inquiry regarding the tenth grade standard, easily resolved. In Bolivar County in 1970, this requirement disqualified 91.9% of black males over 25 and 88.9% of the black females over 25, but only 47.2% of white males and 41.9% of white females of this age. As with the tenth grade requirement, there is no evidence that such a large number of black persons possess twelfth grade equivalencies or GED diplomas, relative to whites possessing such credentials, so as to eliminate or reduce the disproportionately adverse impact of this requirement on blacks.

In response to an interrogatory propounded to them by plaintiffs, defendants outlined the duties of the office and clerical workers of whom a high school diploma is required. These positions include telephone operator/receptionist, key punch and data processing operator, secretary, and mail room and duplicating clerk. Upon close examination of these duties, it does not appear to the court that there is a tangible relationship between the duties of the great majority of defendants' office and clerical staff and any particular level of education. This is especially so regarding the duties of the telephone operator/receptionist and the mail room and duplicating clerk. Lack of a diploma would not conclusively demonstrate that an applicant failed to possess the qualifications necessary to efficiently fulfill the duties of office and clerical workers in defendants' employ, just as possession of a twelfth grade education would not of itself demonstrate that an applicant is qualified for one of these jobs.

Since the institution of the high school diploma standard, the defendants have not considered the use of any alternative to that particular requirement as a screening device. In view of the grossly disparate effect of the requirement on the black members of the labor pool in the Cleveland, Mississippi area the court cannot condone its continued use absent some effort by defendants to discover and employ some other effective standard with a more racially neutral impact.[7]

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[7] Although it appears that the education requirement was not completely to blame, defendants' office and clerical work force was overwhelmingly white as late as six months prior to trial. Between April 1, 1971 and August, 1974, seventy-eight whites and forty-one blacks applied for office or clerical jobs at the Cleveland plant. Ten of the one hundred nineteen applicants were ultimately hired. All ten were white. Between the opening of the defendants' plant in 1950 and August of 1974, no black was hired for an office or clerical job. Defendants have, since 1966, integrated their office and clerical work force to some extent—less than ten percent is black—by transferring black persons employed in other capacities into office and clerical jobs. Defendants have hired some black applicants with clerical qualifications, but have assigned them to work as operatives on the production line.

Defendants also require a high school diploma of those employees who will be considered for promotion to supervisory positions and of those applicants for employment in technician jobs at defendants' plant. Regarding the technician job, defendants maintain that the education requirement is essential to ensure the persons hired for those positions possess the qualities necessary to successfully discharge the duties of the job. The qualities which defendants claim they seek in persons to be employed as technicians are alertness, judgment, comprehension, adaptability, responsibility and initiative. Defendants further argue that their supervisors must possess the same attributes as technicians plus a certain degree of leadership ability in order to effectively perform their duties.

Although there is no doubt that possession of the aforementioned attributes which defendants desire in the persons whom they employ as supervisors and technicians are important, if not absolutely necessary, qualifications, the court perceives no direct relationship between the possession of a high school diploma and the possession of any or all of these qualities. As with the tenth grade requirement, the defendants are simply employing too crude a standard in view of the all but undisputed adverse effect upon blacks.

College Degree Requirement

Defendants presently require an applicant for the job of scheduling analyst, traffic analyst, or systems analyst possess a college degree; however, the degree need not be in any particular discipline or major.

Again, the 1970 Census Report for Mississippi demonstrates that this requirement has a substantial adverse impact on blacks. In Bolivar County in 1970, for example, 14.7% of the white males over 25 and 12.5% of the white females over 25 have college degrees, whereas only 3.2% of black males and 3.3% of black females of the same age have degrees. In Mississippi as a whole, 10% of the white persons in the state over 25 met this requirement while only 3.7% of the black people did.

The college degree requirements for traffic and systems analysts were not instituted until some time subsequent to July 15, 1968. The requirement has not been validated pursuant to EEOC guidelines.

Although no one is presently employed in the traffic and systems analyst jobs, defendants concede that no black has ever been employed in an analyst capacity at their Cleveland plant.

The defendants argue that the college degree requirement for the jobs in the analyst category is necessitated by the "professional demands" of the positions. In view of the disparate effect of the requirement and in the absence of more concrete evidence as to the need for the continued use of this qualification, the court has concluded that the college degree requirement for the jobs of scheduling, systems, and traffic analysts is unjustified and unlawful.

Failure to Post or Announce Vacancies in Jobs Above the Material Handler and Assembler Level

Although the defendants ordinarily announce to assemblers and material handlers the existence of a vacancy in other assembler or material handler positions so that employees may make known their interest in these positions, it is not customary to announce or post information concerning vacancies in office or clerical jobs, technician jobs,

or supervisory positions. Failure to post information concerning vacancies in the clerical, technician, and supervisory positions has resulted in the incumbents of those positions becoming the primary source of information concerning existing and/or expected vacancies. Since the supervisory, clerical, and technician work force, as well as the management, at Travenol's Mississippi facility has been and remains overwhelmingly white, the exposure to job vacancy information is much greater among white employees than among black. Travenol's failure to post notice to vacancies impedes the access of the company's black employees to the better paying and more desirable jobs.

Discrimination in Promotion

The most important criteria for promotion to jobs above the level of operative are an employee's length of service, possession of the requisite amount of education, and the opinion of the employee held by his or her supervisor and certain officials of the personnel department. Because of past and present hiring discrimination against blacks, reliance on length of service in making promotions has a disproportionately adverse impact upon blacks' prospects of promotion. The racial make-up of the defendants' non-custodial work force, exclusive of the operatives, is reflected in the following statistics:

	May, 1964		March, 1966		March, 1968	
Job Level	No.	% White	No.	% White	No.	% White
Officials and Managers	13	100 %	24	100 %	49	100 %
Professionals	0	...	18	100 %	20	100 %
Technicians	25	100 %	27	100 %	66	97.0%
Office and Clerical	24	100 %	23	95.7%	33	97.0%
Craftsmen	46	100 %	18	100 %	32	100 %

Job Level	Feb., 1969 No.	Feb., 1969 % White	March, 1970 No.	March, 1970 % White	March, 1971 No.	March, 1971 % White
Officials and Managers	52	100 %	52	100 %	48	100 %
Professionals	31	96.8%	40	97.5%	47	97.9%
Technicians	51	98.0%	14	100 %	12	100 %
Office and Clerical	29	96.6%	33	97.0%	35	94.3%
Craftsmen	34	100 %	68	98.5%	78	94.9%

Job Level	March, 1972 No.	March, 1972 % White	March, 1973 No.	March, 1973 % White	Feb., 1974 No.	Feb., 1974 % White
Officials and Managers	52	100 %	47	97.9%	53	96.2%
Professionals	52	94.2%	40	92.5%	43	88.4%
Technicians	12	100 %	16	100 %	20	95.0%
Office and Clerical	38	94.7%	34	94.1%	38	92.1%
Craftsmen	79	93.7%	76	93.4%	94	86.2%

All in all, the court has concluded that the procedures for promotion which defendants employ tend to perpetuate the past discrimination suffered by blacks at defendants' Cleveland plant. All the criteria used in the promotion process, while racially neutral on their face, suffer from this failing. Reliance upon length of service must have some adverse effect upon blacks because of their prior exclusion from defendants' noncustodial work force. Use of the twelfth grade requirement has a clearly adverse effect upon blacks in and around Cleveland, Mississippi as was seen earlier. And dependence upon the recommendation of defendants' predominantly white supervisory force is a "ready mechanism" to further impede black access to the supervisory ranks. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 240-43 (5th Cir. 1974); Rowe v. General Motors Corp., 457 F.2d 348, 359 (5th Cir. 1972). The court is of the opinion that, at the minimum, defendants should be required to refrain from use of the twelfth-grade education requirement and to develop and utilize some objective criteria for selection of operatives to be promoted to supervisory positions which will be racially neutral both on their face and in effect. *Pettway, supra,* at 241.

The overall impression of the defendants' operation of their Cleveland plant which the court acquired at the trial in this case is one of well intentioned management attempting to deal with job applicants and employees equally on a case by case, or individual basis; however, the employment policies which defendants adopted in apparent good faith have had the effect of substantially impeding the entry of blacks into the company's work force. The full extent of the cumulative effect of these policies is perhaps not yet appreciated by Travenol management, but the statistics brought forth in this case cannot fail to convince an objective observer that employment opportunities at Travenol's Cleveland plant were certainly and to some extent remain, far from equal at the times pertinent to this case.

While it is no doubt true that a great deal of the segregated nature of defendants' operation in Cleveland may be traced to the racial discrimination which has historically permeated American society in general, by passage and implementation of the Civil Rights Act of 1964, the Congress of the United States announced that the time has arrived to bring minorities into the work force of the nation's industries on an equal footing with persons of the majority race. As the Supreme Court has stated:

> The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800, 36 L. Ed. 2d, 668, 676, 93 S. Ct. 1817 (1973).

On the record in this case, the court is constrained to hold that Travenol's employment practices, particularly prior to 1973, were not consistent with the requirements of Title VII and its underlying purposes and goals. Ac-

cordingly, it will be necessary for defendants to make some adjustments in their employment practices in order to comply with the law of the land.

Sex Discrimination

From February of 1965 until 1968, the master job order form used by the Cleveland office of the state employment services (MSES), specified "male" as a requirement for the material handler positions at the Travenol plant and "female" for the assembler positions. At some point during the summer of 1968, Travenol's personnel manager visited the Cleveland office of MSES and requested elimination of the sex designations on the referral forms. However, sex identification of the assembler position was such in the minds of prospective job applicants that no male applied for an assembler position at defendants' plant until March 31, 1971. Likewise, no females applied for the material handler positions until November of 1971. Defendants did, however, in December 1970, provide female assemblers an opportunity to transfer to material handler positions. Two female assemblers accepted the invitation to transfer. Later, in 1971, a number of female assemblers became material handlers, but ultimately all chose to return to the assembler position.

By the fall of 1972, women made up 100 percent of the assembler work force, but only 2.6 percent of the material handler work force. As was mentioned earlier, assemblers are compensated at a substantially lower rate of pay than material handlers.[8]

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[8] Historically, the assembler pay rate has been closely related to that of the custodial or janitorial staff. In 1965, assemblers were paid four cents per hour more than custodians while material handlers were paid twenty-seven cents per hour more than assemblers. Since 1965, the assembler pay rate has remained tied to that of the custodial work force while the gap between the material handler and assembler pay rates has widened considerably. In 1974, assemblers were paid only three cents per hour more than custodians but material handlers were paid forty-six cents per hour more than assemblers.

As of July 5, 1974, the starting pay rate for material handlers was $3.11 per hour, for assemblers $2.65, and for custodial employees $2.62 per hour.

One of the most arduous and physically demanding positions at defendants' plant is known as the "hooks" job. The hooks positions are occupied by material handlers whose chief job duty is to place empty bottles on and remove filled bottles from the production line. The hooks positions are found only in the solution filling and solution packing departments of the plant. Of the approximately two hundred material handlers employed at defendants' Cleveland plant, about half are assigned to the filling and packing departments. Approximately half the material handlers in these departments—forty to fifty individuals—are assigned to the hooks jobs.

Although there was no policy concerning assignments to the hooks positions prior to 1966, at some point subsequent to that time a practice was established whereby those material handlers performing the hooks job would have the first option—the right of first refusal—at any vacancies which might develop in the other material handler positions within the filling and packing departments. As might be imagined, this policy became necessary because the physical exertion inherent in the hooks positions caused them to be regarded among the employees as somewhat less desirable than the other material handler jobs.

When a vacancy develops in a material handler's job, defendants ordinarily announce its existence to all persons then working as assemblers or material handlers. Each material handler interested in a lateral transfer and each assembler interested in upgrading to a material han-

dlers job may request a transfer and/or promotion. However, material handlers in the hooks positions are given first refusal on the vacancy. Hooks workers very rarely decline offers to transfer to non-hooks positions. This right of first refusal has the effect of transforming any material handler vacancy into a vacancy on the hooks jobs.

Placing the matter in context and considering all the evidence offered at trial the court, as fact finder, has concluded that the defendants, intentionally or otherwise, have structured the material handler jobs at their Cleveland plant so that while the vast majority of them require little heavy lifting, there are a few positions—particularly the hooks jobs—which required a great deal of heavy lifting. The prospect of facing the requirements of the duties of a hooks worker has been an almost foolproof method of blocking the entry of females into the material handler work force. Of the thirteen females initially assigned as material handlers who quit their jobs because of physical inability to perform, eleven—or 84.5%—were assigned to the hooks positions. Among the forty-four female assemblers who declined promotion to material handler between August, 1971 and April, 1973, thirty-nine—or 88.6%—turned down the promotions because they would have found themselves assigned to the hooks positions in the solution filling or solution packing departments.

Although Travenol's management was and is aware that the spectre of the hooks position is effectively preventing entry of women into defendants' material handler work force, there has been no attempt to devise alternative methods of staffing the hooks positions. Because of the devastating impact of the hooks requirement on the movement of females into the material handler work force, Travenol must make at least some attempt to accommodate its employment practices with the goals and requirements of Title VII. EEOC Decision No. 71-1868, April 22, 1971, ¶ 6266, CCH EEOC Decisions (1973); EEOC Decision No. 72-0561, December 20, 1971, ¶ 6308, CCH EEOC Decisions (1973).

SEX DISCRIMINATION RELATIVE TO PREGNANCY

Until 1972, defendants required pregnant employees to take a mandatory six month maternity leave without pay. The leave was required to begin three months prior to the expected date of delivery and to continue until three months after delivery. In May 1972, Travenol instituted a new policy allowing a pregnant employee to continue work prior to delivery so long as her doctor considered it advisable. The policy currently in effect also allows a new mother to return to work following delivery whenever the attending physician advises that a resumption of employment would present no health problems. Under the present policy, maternity leave is still without pay.[9]

In contrast to their forced leave policy regarding pregnancy, the defendants have never required employees suffering from any other sort of medical problem or disability to take leave, particularly leave without pay, for a predetermined period of time.

Travenol maintains a salary continuation plan for the employees at its Cleveland plant which provides for payments at varying rates for certain categories for employees in the event of a disability precluding gainful employment. Although the plan provides for wage continuation during period of temporary disability due to other non-occupational causes, it does not provide payments for temporary pregnancy-related disabilities or for inability to work due to the pregnancy itself. However, the plan does

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[9] The company policy in this regard is set forth in the following language:

> "Maternity leaves of absence will be unpaid until such time as it is definitely determined that applicable law requires otherwise."

provide for payments for disabilities caused by male gender-linked conditions, such as circumcision and hemophilia, and some disabilities more common among males, such as gout and prostatectomy.

Defendants argue that including payment for temporary pregnancy-related disabilities within the coverage of the salary continuation plan would substantially increase the costs of the plan and result in fewer benefits for all employees. The EEOC regulations on this point, which are entitled to "great deference", appear to counter defendants' argument neatly.

> It shall not be a defense under title VII to a charge of sex discrimination in [fringe] benefits that the cost of such benefits is greater with respect to one sex than the other. 29 C.F.R. § 1604.9.

Although there has as yet been no ruling by the Supreme Court on the question of whether the exclusion of pregnancy-related disabilities from fringe benefit programs—such as an income protection plan—maintained by an employer transgresses the terms of Title VII, the Court addressed a related, albeit distinguishable, issue in Geduldig v. Aiello, 417 U.S. 484, 41 L. Ed. 2d 256, 94 S. Ct. 2485 (1974). In *Aiello,* the court held that the State of California did not violate the Equal Protection Clause of the Fourteenth Amendment by failing to include disabilities relating to normal pregnancy under the coverage of its statewide and completely employee funded disability insurance program.

Although defendants argue that *Aiello* is dispositive of the pregnancy disability issues here, the court is more inclined to agree with the analysis of *Aiello* contained in Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3rd Cir. 1975), cert. granted, 421 U.S. 987, 44 L. Ed. 2d 476, 95

S. Ct. 1989.[10] if for no other reason but that in *Aiello* the standard against which defendants' conduct was measured was a constitutional one whereas here it is statutory (Title VII). Two other appellate courts have similarly interpreted *Aiello.* Communications Workers v. American Tel. and Tel. Co., 513 F.2d 1024, 1030-31 (2nd Cir. 1975); Gilbert v. General Elec. Co., 519 F.2d 661, 665-67 (4th Cir. 1975). Accordingly, the court is of the opinion that, in order to comply with Title VII, Travenol must extend full and equal coverage of all its fringe benefit programs to women. Particularly, the disability leave and salary continuation programs must be altered so as to discontinue disparate treatment of pregnant employees, pregnancy, and pregnancy-related disabilities.

Seniority Rights

Having found defendants' hiring and promotion policies violative of Title VII as to both blacks and females, the court must finally address the legality of the procedure employed at the Cleveland plant to determine which employees will be affected in the event of a lay-off or other reduction in the work force.

So far as the evidence shows, Travenol's Cleveland plant never experienced a lay-off until 1972. As a matter of fact, prior to 1972 the defendants had not even formulated a plan or procedure for use in the event of a lay-off. Not surprisingly, the lay-off policy adopted in 1972 was the customary "last hired/first fired" standard.

The 1972 lay-off at the Cleveland plant had a disproportionately adverse effect upon black females. At the time of the lay-off, there were 1068 persons employed as

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[10] Although the Supreme Court's ultimate disposition of *Wetzel* would be of great benefit in determining the issues in this case relating to pregnancy, the court does not feel justified in delaying decision on the point pending the outcome of *Wetzel.*

operatives at Travenol's Cleveland plant. A total of 225 persons were laid-off in the course of the reduction in work force. Of the 306 males employed as operatives at the time, 56, or only 15% of the male work force, were detrimentally affected by the lay-off. Of the 566 white female operatives employed at the time, 87, or only 15.4% of the white female operative work force, were laid-off in the course of the reduction in employees. But of the 196 black females employed as operatives at the time of the lay off, 41.8%, or 82 black women, were adversely affected.

It appears that the law concerning lay-offs which disproportionately affect females and minorities is an even more unsettled state than that concerning pregnancy disabilities, if such is possible. Of course, the court has not been left completely adrift for, as the Fifth Circuit has said, in an employment discrimination case, it is the duty of the district court in the exercise of its discretion, "to carry out within practicable limits the purpose of Title VII, which is to make the discriminatee whole and to remedy the effects of past discrimination." Franks v. Bowman Trans. Co., 495 F.2d 398, 414 (5th Cir. 1974), cert. granted, 420 U.S. 989, 43 L. Ed. 2d 669, 95 S. Ct. 1421 (1975). In the context of considering the legality of a seniority system of an employer which has been found, at some point in the past, to have engaged in unlawful employment practices, the difficulty arises in determining whether the employees now seeking relief from operation of the seniority plan are, in fact, discriminatees under Title VII.

In this circuit, this issue was most recently addressed in Watkins v. United Steel Workers, 516 F.2d 41 (5th Cir. 1975). In *Watkins,* the court refused to disturb the operation of a last hired/first fired lay-off plan, meticulously couching its holding in the following language:

> We hold that, regardless of an earlier history of employment discrimination, when present hiring practices are nondiscriminatory and have been for over ten years, an employer's use of a long-established seniority system for determining who will be laid off, and who will be rehired, adopted without intent to discriminate, is not a violation of Title VII or § 1981 [of Title 42 of the U.S. Code], even though the use of the seniority system results in the discharge of more blacks than whites to the point of eliminating blacks for the work force, where the individual employees who suffer layoff under the system have not themselves been the subject of prior employment discrimination. 516 F.2d at 44-45.

The holding in Watkins is inapplicable to the instant case for many reasons; however, it does point out the various factors which must be considered when determining whether a seniority system somehow fails to comply with Title VII. In the case at bar, the court has found that the employer has a recent history of employment discrimination in the hiring process as to both race (education requirements) and sex (exclusion of females from the material handler work force). In fact, the court has determined that the employer here is presently engaging in some unlawful employment practices as to both females and blacks. Here, in contrast to *Watkins,* the seniority system employed in the event of layoff is of recent origins, having been initially instituted in 1972. Further, it is clear that some of the employees who would be and were affected in the event of a lay-off have themselves been the victims of prior discrimination in hiring practices. For example, it appears likely that, absent the tenth-grade education requirement which the court has found unlawful under Title VII, Ms. Cherry's plant-wide seniority would date from 1970, and that of Ms. Griffin from 1966.

Pending the decision of the Supreme Court in *Franks, supra,* it is apparently the law in this circuit that only those black and/or female employees who have been pre-

vented from attaining their "rightful place" of employment *as individuals* by their employer's unlawful practices are entitled to any relief from a last hired/first fired lay-off system.[11] In other words, only those members of the plaintiff class in this case who can show that, but for Travenol's unlawful discrimination, they would have acquired such seniority rights as to afford them to some degree of insulation from the adverse effects of a lay-off are entitled to any relief from the across-the-board operation of the seniority system. Because such a determination may require a case-by-case examination as to the factual situation of each member of the class, it is impossible for the court to frame any sort of relief at this juncture, having thus far inquired into the merits of the case as to the existence of unlawful discriminatory practices only. However, it is clear at this point that some modification of the last hired/first fired lay-off policy will be required in order to afford the black victims of the tenth and twelfth grade requirements and the female victims of the job assignment discrimination their rightful places within the structure of the seniority system.

Conclusion

By way of summary, the court has determined that, for the reasons set forth in this opinion, an injunction should be issued prohibiting defendants from requiring a tenth grade education (or GED equivalency) of applicants for operative positions; barring defendants from requiring a twelfth grade education (or GED equivalency) of applicants for office and clerical jobs, technician jobs, and supervisory positions; and enjoining Travenol from requiring a college degree as a qualification for the jobs of systems, traffic, or scheduling analyst. The court will also

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[11] Apparently such is also the law in the Second Circuit. See Chance v. Board of Examiners, —— F.2d —— (2nd Cir. 1976), 44 U.S.L.W. 2343 (Jan. 19, 1976).

enter an order directing defendants to include pregnancy and pregnancy-related disabilities under the coverage provided in the salary continuation plan currently in effect on the same basis as all other disabilities. However, either because the record has not yet been sufficiently developed or because the court does not intend to undertake to assume the management of defendants' plant on a day-to-day basis, the court is not presently in a position to rule on the backpay question, the specific alterations to the defendants' seniority system which are necessary to afford certain employees their "rightful places", or the question of modification of the manner in which employees are assigned to the hooks positions in the solution packing and filling departments. On these issues, the court has determined to require the parties to submit suggestions and proposals as to how the court should approach disposition of these questions. An order will be entered accordingly.

This 19th day of February, 1976.

/s/ Orma R. Smith

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

(Caption Omitted in Printing)

Order

This action came on for hearing before the court, Honorable Orma R. Smith, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered, it is

ORDERED AND ADJUDGED:

(1) That an injunction be duly issued restraining and enjoining defendants, Travenol Laboratories, Inc., and Baxter Laboratories, Inc., the officers, agents, servants, representatives, employees, successors or assigns of either or both of them, and all those persons in active concert with either or both of them who receive actual notice of said injunction from:

(a) Discriminating on the basis of color, race, or sex in employment practices or conditions of employment in defendants' Cleveland, Mississippi facility, against the named plaintiffs in the above captioned action or either of them, or any member of the class which they represent, as such class is defined in the court's memorandum of opinion this day released in said action;

(b) Requiring a tenth grade education (or its equivalency on a General Education Development [GED] test) of applicants for employment for operative positions in defendants' said facility;

(c) Requiring a twelfth grade education (or its GED equivalency) as a condition of employment in

office, clerical, technician and supervisory positions in defendants' said facility; and

(d) Requiring a college degree as a qualification for the positions of systems, traffic, or scheduling analyst, in defendants' said facility.

(2) That a mandatory injunction be duly issued against the parties aforesaid requiring that they and each of them forthwith provide employee coverage for pregnancy and pregnancy-related disabilities in the salary continuation plan currently in effect at the facility aforesaid.

(3) That the injunction aforesaid shall become effective from and after March 15, 1976, unless vacated or modified by the court.

(4) That such other or further relief as plaintiffs and members of the class which they represent may be entitled to receive pursuant to the court's memorandum of decision herein released shall await further action of the court, and in contemplation of such other or further relief the parties are directed to

(a) File with the clerk, serve upon counsel opposite, and submit to the court, within twenty (20) days of the date of entry of this order, suggestions or proposals concerning modification of the seniority system currently in effect at defendants' Cleveland, Mississippi facility so as to afford those black and/or female employees at the aforesaid facility who have personally and individually been adversely affected or discriminated against by defendants' hiring, promotion, and transfer practices their "rightful places" within the aforesaid seniority system.

(b) File with the clerk, serve upon counsel opposite, and submit to the court, within twenty (20) days of the date of entry of this order, suggestions or proposals as to how the court might proceed in ascertain-

ing the extent of defendants' liability for monetary damages in the nature of backpay to the named plaintiffs in this cause and the members of the class which they represent, including proposals or suggestions as to whether additional notice should be furnished those persons who responded to the notice of pendency of action by indicating a desire to opt-out and, if so, the contents of such supplemental notice.

(c) File with the clerk, serve upon counsel opposite, and submit to the court, within twenty (20) days of the date of entry of this order, suggestions or proposals as to how the defendants' job assignment system currently in effect at its Cleveland, Mississippi facility and pertaining to the staffing of the "hooks" position at such facility may be modified in order to cease impeding the entry of females into defendants' material handler work force in such a way as the court has found in its memorandum of decision, released this day, to violate Title VII of the Civil Rights Act of 1964.

(d) To file with the clerk, serve upon counsel opposite, and submit to the court, within twenty (20) days of the date of entry of this order, any request which the parties may have for specific findings or conclusions by the court on any issues in contention in this case which are not contained in the Memorandum of Decision released this day in this cause.

This 19th day of February, 1976.

/s/ ORMA R. SMITH

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

No. DC 72-13-S

WILLIE MAE PAYNE, et al, *Plaintiffs*

v.

TRAVENOL LABORATORIES, INC., et al, *Defendants*

Injunction

To: Travenol Laboratories, Inc., and Baxter Laboratories, Inc., and to the officers, agents, servants, representatives, employees, successors or assigns, of each or both of them, and all those persons in active concert with either or both of them who receive actual notice of this injunction by personal service or otherwise.

YOU ARE HEREBY ENJOINED and restrained from directly or indirectly

(1) Discriminating on the basis of color, race, or sex in employment practices or conditions of employment in defendants' Cleveland, Mississippi facility, against the named plaintiffs in the above captioned action or either of them, or any member of the class which they represent, as such class is defined in the court's memorandum of opinion this day released in said action;

(2) Requiring a tenth grade education (or its equivalency on a General Education Development [GED] test) of applicants for employment for operative positions in defendants' said facility;

(3) Requiring a twelfth grade education (or its GED equivalency) as a condition of employment in office, clerical, technician and supervisory positions in defendants' said facility;

(4) Requiring a college degree as a qualification for the positions of systems, traffic, or scheduling analyst, in defendants' said facility.

YOU ARE FURTHER MANDATORILY ENJOINED and directed to provide employee coverage for pregnancy and pregnancy-related disabilities in the salary continuation plan currently in effect at the facility aforesaid.

By order of the court, the provisions, terms, and conditions of this injunction shall be effective from and after March 15, 1976, and shall thereafter remain in full force and effect unless or until vacated or amended by the court.

This injunction is issued pursuant to the directions of the court at 12:00 o'clock Noon, this the 19th day of February, 1976.

NORMAN L. GILLESPIE
Clerk of the Court for the
Northern District of Mississippi

By: /s/ MARGARET K. TUBBS

Supreme Court, U. S.
FILED
JUL 21 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 77-1815

WILLIE MAE PAYNE, *et al.*, *Petitioners,*

v.

TRAVENOL LABORATORIES, INC., *et al.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Dated: July 21, 1978

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STATEMENT OF THE CASE

On January 6, 1978, the United States Court of Appeals for the Fifth Circuit issued a unanimous decision reversing in part and affirming in part an award of injunctive relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. Circuit Judge Roney's opinion, in which Circuit Judges Thornberry and Ainsworth joined, vacated as unduly vague that portion of the injunction which generally commanded respondents to obey the law. Also vacated was a portion of the injunction prohibiting use of a tenth grade education or equivalency requirement for hiring. The court determined that none of the petitioners had standing to challenge this requirement. The court affirmed prohibitions against use of twelfth grade and college degree requirements.

Petitioners filed a petition for rehearing and suggestions for rehearing en banc on January 17, 1978. They challenged the court's conclusion with respect to standing. Conceding that all the named plaintiffs had tenth grade or better educations or equivalencies when the suit was filed, petitioners asserted that, at the time of filing, at least one named plaintiff had a valid back pay claim based on the tenth grade requirement. The court unanimously denied the petition on March 23, 1978.

Petitioner Willie May Payne commenced an action against respondents on March 2, 1972. She had obtained a tenth grade equivalency certificate on January 19, 1970. Subsequent to receipt of the certificate, she applied for employment with respondents and was rejected. She filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) on January 29, 1970. Although she testified that she had begun applying for employment at respondent's facility in 1967 or 1968, the

record contains no evidence as to if, or when, she applied between 1968 and the date she obtained her tenth grade certificate.

Petitioner Delilah Cherry intervened in this action in 1973, at which time she was not employed at respondents' facility. Ms. Cherry received a tenth grade equivalency certificate in 1967. In her complaint, she alleged that she first applied for employment with respondents after receiving her certificate and was rejected. At trial, she testified that she first applied to respondents in 1965 or 1966. Ms. Cherry filed a charge with the EEOC on August 15, 1970.

THE WRIT SHOULD NOT BE GRANTED

The decision of the Court of Appeals to vacate the injunction against respondents' tenth grade requirement is unremarkable, to say the least. It is based on the simple principle that parties lack standing to challenge practices which never could and never will cause them any injury. Petitioners plainly failed to demonstrate that they had been harmed by the tenth grade requirement within the relevant periods of limitation.

Petitioners offer three grounds for granting a writ of certiorari. First, they contend that the Court of Appeals refused to recognize past injury as grounds for standing and ignored decisions of this Court and other Courts of Appeals. Second, they contend that the Court of Appeals used the class definition to deprive them of standing. Finally, they contend that the Court of Appeals' decision will inhibit private enforcement of the civil rights laws. Each of petitioners' grounds has no validity, unless the record below is ignored or distorted.

The Court of Appeals and District Court are in agreement on all material questions of fact. For this Court to review the record once more would be wasteful and an improper use of certiorari. All the purported conflicts with other precedents, all the purported departures from established practice, and all the purported inhibitions against private litigants depend for their existence on a rejection of the facts as interpreted by the District Court and the Court of Appeals.

A. The Court of Appeals' Decision On Standing Is Grounded On The Finding That Petitioners Failed To Demonstrate Injury In Fact.

1. Petitioners Failed To Establish Direct Injury From The Tenth Grade Requirement.

The Court of Appeals denied petitioners standing because they failed to demonstrate injury in fact. App. 3a-4a.[1] That Article III standing is predicated on "injury in fact" can hardly be disputed. This Court clearly articulated that standard in *Warth* v. *Seldin*, 422 U.S. 490, 505 (1975); *see Regents of the University of California* v. *Bakke*, ___ U.S. ___, ___ n.14, 46 U.S.L.W. 4896, 4899 n.14 (1978) (Powell, J.). And in *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977), this Court held that a plaintiff cannot, either as an individual or as a class representative, attack an employment practice which has not injured or could not injure him or her.

Petitioners' suggestion that they suffered actual injury from the tenth grade requirement prior to obtaining their tenth grade certificates is inconsistent with the record. Petitioners simply failed to show that they applied for

[1] Citations to Petitioners' appendix are designated "App. ."

employment during the relevant limitations periods while lacking tenth grade certificates.

In order to state a cause of action under Title VII based on the tenth grade requirement, petitioners had to show that they were rejected because of the requirement within 90 days of filing a charge with the Equal Employment Opportunity Commission. Civil Rights Act of 1964, § 706(e), 78 Stat. 259 (1964).[2] This is a jurisdictional prerequisite to establishing a cause of action. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Since Ms. Payne obtained a tenth grade equivalency certificate on January 19, 1970 and filed an EEOC charge on January 29, 1970, she had to prove that she applied for employment between November 1, 1969 and January 19, 1970. She failed to do so.[3] As stated by the Court of Appeals,

> Plaintiffs also attempt to establish standing by noting that during at least 80 of the 90 days preceding the January [29], 1970, filing of plaintiff Willie Mae Payne's first EEOC charge, she failed to satisfy the tenth grade education requirement. No evidence appears in the record to suggest that Ms. Payne applied for employment during this 80-day period.

[2] In 1972, the Act was amended to extend the limitations period to 180 days. This amendment has no impact on petitioners' claims. 42 U.S.C. § 2000e-5(e).

[3] Petitioners' suggestion that Title VII claims are kept alive by the Mississippi back pay statute of limitations is completely at odds with the Act. See Petition For A Writ Of Certiorari, at 15-16. The statute clearly requires the filing of a charge within the time prescribed in section 706(e) to have a valid cause of action. Whether, once a valid claim is proven, a plaintiff may be awarded back pay for a continuing violation extending beyond the 90 day period is a wholly distinct question. Petitioners cannot use a remedy provision to bootstrap jurisdiction for a lapsed claim.

App. 5a.[4]

> This finding is in accordance with the findings of the District Court. The District Court stated,
>
> > There was some controversy as to when Ms. Payne initially applied for employment at the Baxter plant; however, the parties have stipulated that she did so at least as early as March 17, 1970.

App. 33a-34a.[5]

Petitioner Cherry similarly could not prove to have applied during any Title VII limitations period. She obtained her tenth grade certificate in 1967, years before she or Ms. Payne filed charges with the EEOC.

The Civil Rights Act of 1866, 42 U.S.C. § 1981, unlike Title VII, does not expressly incorporate a limitations period. The limitations period employed is that in the limitations statute of the forum state applying to analogous actions. In Mississippi, that limitations period, at the time the complaint in this case was filed, was three years. *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1379 & n.49 (5th Cir. 1974). Since the complaint was filed on March 2, 1972, petitioners had to prove that

[4] The slip opinion, reproduced in the appendix, contains a typographical error that Ms. Paynes' charge was filed on January 19, 1970. The correct date of January 29 appears in the printed opinion. Payne v. Travenol Laboratories, Inc., 565 F.2d 895, 899 (5th Cir. 1978).

[5] If petitioners regarded the District Court's finding to be incorrect or inadequate, they had the opportunity to request a new finding. The District Court specifically invited such requests. Order of February 19, 1976, ¶4(d), App. 68a. Yet petitioners, although requesting numerous other findings, never asked for an additional finding concerning Payne's application history with respondents. See Plaintiffs' Requests For Specific Findings of Fact, Conclusions of Laws, and Rulings on Remaining Issues (March 15, 1976).

they applied for employment while unable to meet the tenth grade requirement after March 2, 1969. Ms. Cherry, having obtained a tenth grade certificate in 1967, cannot possibly have such a claim. Ms. Payne, as the above review of the record makes clear, failed to prove a specific application between March 2, 1969 and January 19, 1970.

Petitioners' suggestion that a six year statute of limitations applies to actions under 42 U.S.C. § 1981 for injunctive relief is wholly inapposite. Since both petitioners were capable of meeting the tenth grade requirement when the complaint was filed, they could not possibly have obtained an injunction against prospective use of the requirement. If they had claims at all, they were for back pay only. Moreover, the lone District Court opinion relied on by petitioners for the proposition that the statute of limitations for injunctive actions under section 1981 differs from the statute for back pay actions appears flatly inconsistent with the Court of Appeals holding in *Johnson* v. *Goodyear Tire & Rubber Co.*, supra.

Petitioners also erroneously contend that the Court of Appeals substituted the class cut off date for the relevant limitations dates under Title VII and 42 U.S.C. § 1981. Petitioners can make this contention only by using a quotation from the Court of Appeals' opinion taken completely out of context. *See Petition for a Writ of Certiorari,* at 18.

When the Court of Appeals' reference to the class cut off date is viewed in context, it becomes clear that the court used the date only with reference to claims petitioners asserted they had as class members, rather than as individuals. Petitioners, effectively conceding their failure of proof, argued that under *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), they did

not have to show at trial that they actually applied to respondents to be eligible for a back pay award. Instead, they suggested that they could come forward after trial and make the showing required by *Teamsters* as members of the class. The Court of Appeals correctly observed, however, that the class definition excluded claims arising before March 3, 1970. This was not, as petitioners contend, an extinguishment of any claim. Nor was it a holding that petitioners had less right to recover back pay because they represented a class. Indeed, it was only because they represented a class that petitioners were able to make their novel suggestion that they possessed greater rights as class members than as individuals. Petitioners had a full opportunity to present their individual claims at trial. Any rights *Teamsters* may afford them as members of a class cannot be larger than the rights they possessed as individuals.

The conclusion that petitioners failed to prove that they applied to respondents during the relevant limitations periods is inescapable. This failure of proof, moreover, occurred in a context in which respondents had attacked petitioners' standing generally in their Answer to the Complaint and Ms. Payne's standing as to the tenth grade requirement specifically in an early motion filed almost three years prior to trial. *Answer* (April 26, 1972); *Motion to Define and Limit the Class* (June 26, 1972); *Memorandum of Points and Authorities In Support of Motion to Define and Limit the Class* (June 26, 1972).

The Court of Appeals had the record before it. The relevant portions were illuminated by the parties' briefs and the decision of the District Court and were reargued to the court when petitioners requested rehearing. Further review of the record will be of no avail to petitioners, but

will only forestall the consequences of their inadequate evidentiary showing at trial.

2. Petitioners Did Not Suffer Indirect Injury From the Tenth Grade Requirement.

Petitioners do not possess the indirect injury from the tenth grade requirement that was recognized by this Court in *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972). Because they were not employed by respondents when the complaint was filed, they suffered no impact from the composition of respondents' work force. By contrast, the plaintiffs in *Trafficante* were actually residents of an apartment complex allegedly restricted to whites by the defendant. Similarly, in each Court of Appeals case cited by petitioners, the plaintiffs were actually employed by the defendant when they filed their complaints. *See EEOC* v. *Bailey Co.*, 563 F.2d 439 (6th Cir. 1977), *cert. denied*, ___ U.S. ___, 46 U.S.L.W. 3555 (1978);[6] *Waters* v. *Heublein, Inc.*, 547 F.2d 466 (9th Cir. 1976), *cert. denied*, 433 U.S. 915 (1977); *Gray* v. *Greyhound Lines, East*, 545 F.2d 169 (D.C.Cir. 1976).

The plaintiffs in *Trafficante* and the other cases cited by petitioners all had direct daily contact with an atmosphere influenced by the defendants. Thus, they had standing. Petitioners were removed from respondents' work force. They could not base standing on their contact with it.

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[6] EEOC v. Bailey Co. further differs in that the EEOC, not the charging employee, eventually initiated suit. Under Title VII, the EEOC could have launched its own investigation and civil action without any employee charge.

B. The Court Of Appeals Did Not Use The Class Termination Date To Deprive Petitioners Of Standing.

Petitioner's contention that the class termination date was improperly used merely recapitulates part of their earlier argument concerning standing. As noted above, the Court of Appeals relied on the class definition only to the extent petitioners attempted to assert standing as class members.

Perhaps the best illustration of the fact that the Court of Appeals did not use the March 3, 1970 class cut-off date to determine petitioners' individual standing is the quotation set forth at page 4 of this Brief. It shows — beyond dispute—that the Court of Appeals specifically addressed the ninety-day period prior to January 29, 1970.

C. The Court Of Appeals Has Not Improperly Restricted Access To the Courts.

To state that the Court of Appeals has restricted access to the courts is to ignore the doctrine of standing. Obviously, a requirement that plaintiffs demonstrate injury in fact will decrease the number of lawsuits heard by the judiciary. But that is what the Constitution requires.

In addition, the Court of Appeals has not inhibited enforcement of Title VII. Those individuals truly injured by the tenth grade requirement are free to attack it. If the requirement is illegal, such an attack can fully vindicate all victims' rights. To bar from court individuals who were not in the past and will not in the future be harmed by an employment practice is not to prevent enforcement of the civil rights laws. It is to uphold Article III of the Constitution.

Finally, the Court of Appeals' opinion puts no one to the "harsh choice" of remaining unemployable or losing standing. Petitioners were not denied standing because they obtained tenth grade certificates. They were denied standing because they failed to prove they applied to respondents within the relevant limitations periods while they lacked certificates. It was not the fact that they obtained certificates that deprived them of standing. It was their failure to prove that they in fact applied for employment within the period of limitations prior to obtaining the certificates.

CONCLUSION

The opinion of the Court of Appeals is correct in all respects and is altogether unexceptional. It is in complete harmony with the decisions of this Court and of other Courts of Appeals. Petitioners' contentions are all based on a rejection of the facts as interpreted by both the Court of Appeals and the District Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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